

Amendments to the Illinois Freedom to Work Act

AN ACT concerning employment.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Illinois Freedom to Work Act is amended by changing Sections 5 and 10 and by adding Sections 15, 20, 25, 30, and 35 as follows:

(820 ILCS 90/5)

Sec. 5. Definitions. In this Act:

"Covenant not to compete" means an agreement:

(1) between an employer and an employee that restricts such 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 such employee's work for the employer included as a party to the agreement.

(2) that is entered into after the effective date of this Act. "Covenant not to compete" also means an agreement between an employer and an employee that by its terms imposes adverse financial consequences on a former employee if the employee engages in competitive activities after the termination of the employee's employment with the employer.

"Earnings" means the compensation reflected on box one of the employee's United States internal revenue service form W-2 that is paid to an employee over the prior year, or portion of the prior year, for which the employee was employed, annualized and calculated as of the earlier of the date that enforcement of the Covenant not to compete is sought or the date of separation.

"Employee" has the meaning given to such term in Section 2 of the Wage Payment and Collection Act.

"Employer" has the meaning given to such term in subsection (c) of Section 3 of the Minimum Wage Law. "Employer" does not include governmental or quasi-governmental bodies.

"Covenant not to compete" does not include (A) a covenant not to solicit, (B) a confidentiality agreement or covenant, (C) a covenant or agreement prohibiting use or disclosure of trade secrets or inventions, (D) invention assignment agreements or covenants, (E) a covenant or agreement entered into by a person purchasing or selling the goodwill of a business or otherwise acquiring or disposing of an ownership interest, ~~or~~ (F) clauses or an agreement between an employer and an employee requiring advance notice of termination of employment, during which notice period the employee remains employed by the employer and receives compensation; or (G) separation or settlement agreements by which the employee agrees not to

reapply for employment to the same employer after termination of the employee.

“Covenant not to solicit” means an agreement between an employer and an employee (A) that restricts an employee from soliciting for employment the employer’s employees or (B) that restricts an employee from soliciting for services of any kind, or interfering with the employer’s relationships with, the employer’s clients, prospective clients, vendors, prospective vendors, suppliers, prospective suppliers, or other business relationships.
(Source: P.A. 99-860, eff. 1-1-17; 100-225, eff. 8-18-17.)
(Source: P.A. _____, eff. 1-1-21.)

(820 ILCS 90/10)

Sec. 10. Prohibiting covenants for specified employees.

(a) No employer shall enter into a covenant not to compete ~~or a covenant not to solicit~~ with any employee of the employer whose annualized rate of earnings, including salary, bonus, commissions or any other form of taxable compensation, do not exceed seventy-five thousand dollars per year. No employer shall enter into a covenant not to solicit with any employee of the employer whose annualized rate of earnings, including salary, bonus, commissions or any other form of taxable compensation, do not exceed thirty seven thousand five hundred dollars per year. This dollar amount must be adjusted annually for inflation. Annually on September 30th the department of labor must adjust the dollar amounts specified in this section by calculating to the nearest cent using the consumer price index for urban wage earners and clerical workers, CPI-W, or a successor index, for the twelve months prior to each September 1st as calculated by the United States department of labor. The adjusted dollar amount calculated under this section takes effect on the following January 1st.

(b) A covenant not to compete ~~and a covenant not to solicit are is~~ void and illegal for any employee ~~(i)~~ who an employer terminated as the result of a Covid-19 related layoff; or ~~(ii) who an employer furloughed,~~ unless enforcement of the not to compete or the covenant not to solicit includes compensation equivalent to the employee’s base salary at the time of termination for the period of enforcement minus compensation earned through subsequent employment during the period of enforcement.

(Source: P.A. 99-860, eff. 1-1-17.)

(Source: P.A. _____, eff. 1-1-21.)

(820 ILCS 90/15)

Section 15. Enforceability of a covenant not to compete.

(a) For employees not covered by Section 10 in this Act, a covenant not to compete entered into between an employer and employee is illegal and void unless (i) the employee receives adequate consideration, and (ii) it is ancillary to a valid employment relationship.

(b) An employee has not received adequate consideration from an employer for a covenant not to compete unless (i) the employee worked for the employer for at least two years from the date the employee signed the covenant not to compete, or (ii) the employer provided the employee with adequate consideration to supportsome other fair and reasonable consideration specifically in exchange for the covenant not to compete.

- (c) For employees not covered by Section 10 in this Act, a covenant not to compete entered into between an employer and employee is illegal and void unless (i) it is no greater than is required for the protection of a legitimate business interest of the employer, (ii) it does not impose undue hardship on the employee, and (iii) it is not injurious to the public. Whether a legitimate business interest exists is based on the totality of the facts and circumstances of the individual case. ~~Factors to be considered in this analysis include, but are not limited to, the near-permanence of customer relationships, the employee's acquisition, use, or knowledge of confidential information through the employee's employment, and time, place, and scope of activity restrictions.~~

(Source: P.A. _____, eff. 1-1-21.)

(820 ILCS 90/20)

Section 20. Enforceability of a covenant not to solicit.

- (a) For employees not covered by Section 10 in this Act, a covenant not to solicit entered into between an employer and employee is illegal and void unless (i) the employee receives adequate consideration, and (ii) it is ancillary to a valid employment relationship.
- (b) An employee has not received adequate consideration from an employer for a covenant not to solicit unless (i) the employee worked for the employer for at least two years from the date the employee signed the covenant not to solicit clients, or (ii) the employer provided the employee with adequate consideration to support~~some other fair and reasonable consideration specifically in exchange for~~ the covenant not to solicit.
- (c) For employees not covered by Section 10 in this Act, a covenant not to solicit entered into between an employer and employee is illegal and void unless (i) it is no greater than is required for the protection of a legitimate business interest of the employer, (ii) it does not impose undue hardship on the employee, and (iii) it is not injurious to the public. Whether a legitimate business interest exists is based on the totality of the facts and circumstances of the individual case. ~~Factors to be considered in this analysis include, but are not limited to, the near-permanence of customer relationships, the employee's acquisition, use, or knowledge of confidential information through the employee's employment, the employee's exposure to the employer's customer relationships or other employees, and time, place, and scope of activity restrictions.~~

(Source: P.A. _____, eff. 1-1-21.)

(820 ILCS 90/25)

Section 25. Ensuring employees are informed about their obligations.

- (a) A covenant not to compete entered into between an employer and employee is illegal and void unless the employer advises the employee in writing to consult with an attorney before entering into the covenant not to compete.
- (b) A covenant not to solicit entered into between an employer and employee is illegal and void unless the employer advises the employee in writing to consult with an attorney before entering into the covenant not to solicit.
- (c) A covenant not to compete entered into between an employer and employee is illegal and void unless (i) the employer provides the employee with a copy of the covenant not to compete at least fourteen calendar days before the commencement of the employee's employment, or (ii) the employer provides the employee with at least fourteen calendar days to review the covenant not to compete.

- (d) A covenant not to solicit entered into between an employer and employee is illegal and void unless (i) the employer provides the employee with a copy of the covenant not to solicit at least fourteen calendar days before the commencement of the employee's employment, or (ii) the employer provides the employee with at least fourteen calendar days to review the covenant not to solicit.

(Source: P.A. _____, eff. 1-1-21.)

(820 ILCS 90/30)

Section 30. Remedies.

- (a) In any civil action initiated by an employer involving a covenant not to compete or a covenant not to solicit in addition to any remedies available under any agreement between an employer and an employee, a prevailing employee shall recover costs and all reasonable attorney's fees.

(Source: P.A. _____, eff. 1-1-21.)

(820 ILCS 90/35)

Section 35. Reformation.

- (a) Extensive judicial reformation of a covenant not to compete or a covenant not to solicit entered into between an employer and an employee may be against the public policy of the State of Illinois.
- (b) In some circumstances, a court may, in its discretion, choose to reform a covenant not to compete or a covenant not to solicit entered into between an employer and an employee rather than hold such covenant unenforceable. When deciding whether such reformation is appropriate, a court should consider the fairness of restraints as writtendrafted, and only make reformations if the ~~employer demonstrates that the scope of the~~ original restriction reflects ~~presents~~ a ~~reasonable and~~ good-faith effort to protect a legitimate business interest of the employer.

- ~~(c) — If a court reforms a covenant not to compete or a covenant not to solicit entered into between an employer and an employee, the employer shall pay the employee's costs and reasonably attorneys' fees incurred prior to the date of such reformations, and the employer shall not recover any damages (including but not limited to actual damages or reasonable attorneys' fees) from the employee for any actions occurring prior to such reformations.~~

(Source: P.A. _____, eff. 1-1-21.)