

Staying One Step Ahead: The Evolving Landscape of Employment Law

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Part I

**Restrictive Covenants:
Non-Competition and Non-Solicitation Provisions**

Basic Terminology

Employee mobility vs. Employer restrictions (restrictive covenants)

Types of Restrictive Employment Agreements:

- Non-Compete
- Non-Solicitation of Customers/Clients/Employees
- Confidentiality/Non-Disclosure
- Payment for competition agreements
- Training-repayment agreements



Basic Terminology

Illinois Freedom to Work Act

- Previously the Act prohibited employers from entering into non-competes with employees who earned less than \$13.00 per hour
- The Amendment, effective January 1, 2022, includes significant changes to the law of restrictive covenants in Illinois employment contracts



Restrictive Covenants

- As Amended, FWA prohibits non-compete agreements for employees earning \$75,000 per year or less. Increase by \$5,000 every 5 years.
- FWA prohibits customer and co-worker non-solicit agreements for employees earning \$45,000 per year or less. Increase by \$2,500 every five years.
- Prohibits non-competes for workers in the construction industry, but excludes owners and those involved in management, engineering, architectural design, and sales.
- Prohibits non-competes for individuals covered by a collective bargaining agreement under the Illinois Public Labor Relations Act or Illinois Educations Labor Relations Act
- The amendments are prospective (covenants entered into after January 1, 2022)

Restrictive Covenants, Continued

- Codifies (sort of) the concept of adequate consideration
 - The employee worked for at least 2 years after the employee signed an agreement containing a restrictive covenant (previously in the case law, now in the statute)
 - The employer otherwise provided consideration adequate to support a restrictive covenant, which consideration can consist of a period of employment plus additional professional or financial benefits or *“merely professional or financial benefits adequate by themselves”* (?)
- Codifies the meaning of legitimate business interest of the employer
- Allows for reformation at the discretion of a court
- Prohibits enforcement of restrictions for COVID-related layoffs

Restrictive Covenants, Continued

Notice Provision

- Employers who present employees with covenants not to compete or covenants not to solicit are required to advise employees in writing to consult with an attorney before entering into the covenant and to provide the employee with a 14 day review period.
- If the notice obligations are not complied with, the covenant is illegal and void. 820 ILCS 90/20.

Remedies

- If an employee prevails on a claim to enforce a covenant not to compete or a covenant not to solicit, the employee shall recover from the employer costs and reasonable attorneys' fees.

Possible Intervention at the Federal Level



Executive Order on Promoting Competition in the American Economy

“A fair, open, and competitive marketplace has long been a cornerstone of the American economy ...”

(g) To address agreements that may unduly limit workers’ ability to change jobs, the Chair of the FTC is encouraged to consider working with the rest of the Commission to exercise the FTC’s statutory rulemaking authority under the Federal Trade Commission Act to curtail the **unfair use** of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.

QUESTION: What is “unfair use”?

What About Wages?



Illinois Wage Payment and Collection Act

- The IWPCA was amended effective July 9, 2021 to increase the monthly penalty for underpaying wages from 2% to 5% of the amount of the underpayment. 820 ILCS 115/14(a).
- The amendment makes the monthly penalty provision parallel to the monthly penalty provision in the Illinois Minimum Wage Law. 820 ILCS 105/12(a).

What About Non-Harassment Training



Illinois Law

Illinois Human Rights Act

- mandates that Illinois employers provide annual sexual harassment prevention training that meets or exceeds the Illinois Department of Human Rights model training program.

Restaurants and bars

- must additionally provide employees with supplemental training and a written sexual harassment prevention policy (in English and Spanish) to show specific conduct, activities, or videos related to the restaurant or bar industry and to explain managers' liability and responsibility under the law. 775 ILCS 5/2-110

Now add Chicago Ordinance ...

The City of Chicago's Human Rights Ordinance will be amended effective July 1, 2022 to:

- Expand the definition of sexual harassment to include sexual misconduct, which is defined as any behavior of a sexual nature which also involves coercion, abuse of authority, or misuse of an individual's employment position.
- Require all employers in the City of Chicago to have a written policy on sexual harassment and to post a written notice on sexual harassment.
- Expand the statute of limitations from 300 to 365 days.
- Require one hour of annual training for all employees in the City of Chicago, with one additional hour of training for managers and supervisors.
- Increase the fines for violations of the sexual harassment provisions to \$5,000 to \$10,000 per violation

Illinois Human Rights Act Amendments

- Adds to the definition of disability discrimination, now including “unlawful discrimination against an individual because of the individual’s ***association*** with a person with a disability.” 775 ILCS 5/1-103 (L).
- A civil rights violation for an employer to use a person’s conviction record as a basis to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, or privileges or conditions of employment. 775 ILCS 5/2-103.1(A).

Human Rights Act Amendments, Continued

The factors to consider when evaluating whether either exception applies include:

- 1) the length of time since the conviction,
- 2) the number of convictions,
- 3) the nature and severity,
- 4) the facts or circumstances surrounding the conviction,
- 5) the age at the time of the conviction, and
- 6) evidence of rehabilitation efforts. 775 ILCS 5/2-103.1(B).



Part II

Illinois Equal Pay Act Amendments

What is Required and From Whom?

Private employers in Illinois that (1) file an EEO-1 report with the Equal Employment Opportunity Commission and (2) have more than 100 employees in Illinois must apply for and obtain an equal pay registration certificate from the Illinois Department of Labor (IDOL).

What to Submit?

- Pay a fee and
- Submit wage and demographic information for Illinois-based employees
- Certify:
 - i. the business is in compliance with the equal pay act and related laws;
 - ii. the average compensation for female and minority employees is not consistently below the average compensation for its male and non-minority employees within each of the major job categories in the EEO1 report, taking into account various enumerated factors;
 - iii. the business does not restrict employees of one sex to certain job classifications and makes retention and promotion decisions without regard to sex;
 - iv. wage and benefit disparities are corrected when identified; and
 - v. how often wages and benefits are evaluated 820 ILCS 112/11(c)(1).

How to Learn More?

IDOL provided information on its website that will help employers understand the requirements of the compliance statement and see the excel spreadsheet format recommended for data submission. This is supplemented with the addition of several Frequently Asked Questions.

<https://www2.illinois.gov/idol/Laws-Rules/CONMED/Pages/eparc.aspx>.

<https://www2.illinois.gov/idol/Laws-Rules/CONMED/Pages/eprc-faqs.aspx>.



Factors Other Than GENDER...

The Employer's wage submission does not include factors that may influence pay

Employers are encouraged to analyze the following:

- Length of service
- Requirements of specific jobs
- Experience, skill, effort, responsibility,
- Working conditions of the job
- Education
- Training
- Job locations
- Use of a collective bargaining agreement or
- Other mitigating factors



Victims' Economic Security and Safety Act

The law now permits leave relating to a “crime of violence,” which can include sexual offenses, assault, harassment and obscene communication. 820 ILCS 180.10 (2.5).

Employees can now also take leave for a much broader group of family members, including a party to a civil union, grandparents, grandchildren, siblings, or “any other individual whose close association with the employee is the equivalent of a family relationship as determined by the employee.” 820 ILCS 180.10 (12).

Illinois Health Care Right of Conscience Act

Not a violation of the act for an employer to impose or enforce any requirements “that involve provision of services by a physical or health care personnel intended to prevent contraction or transmission of COVID-19 or any pathogens that “result in COVID-19 or any subsequent iterations.” 745 ILCS 70/13.5.



Chicago Vaccine Anti-Retaliation Ordinance

- Vaccine Anti-Retaliation Ordinance prohibits employers from retaliating against workers for taking time to get the COVID-19 vaccine. Anti-Retaliation Ordinance, SO2020-2343.
- Employers are also prevented from terminating, demoting or taking any adverse action against employees that stay home to care for an individual staying at home to minimize the transmission of COVID-19, experiencing symptoms or sick with COVID-19, or obeying a quarantine order issued to the employee.
- Covered employees include those who in any particular two-week period, perform at least 2 hours of work for an Employer while physically present in the City, but it does not include those who work for an Employer who has fewer than 4 employees.

Concluding Thoughts

Let's turn to questions submitted in the chat function...

Please feel free to reach out with questions you did not have a chance to ask.

Thank you!