

Employment & Labor Law FLASHPOINTS August 2021

Catherine R. Locallo, *Robbins Schwartz* [<http://www.rsnil.com>] , Chicago
312-332-7760 | E-mail Catherine R. Locallo [<mailto:clocallo@robbins-schwartz.com>]

Illinois Committed to Restrictive Covenant Reform Through Passage of Senate Bill 672

The passage of S.B. 672, 102d Gen.Assem. (2021) [<https://www.ilga.gov/legislation/fulltext.asp?DocName=10200SB0672enr&GA=102&SessionId=110&DocTypeId=SB&LegID=133278&DocNum=672&GA>], by both houses represents another reform initiative by the Illinois General Assembly. This reform initiative serves to amend the Illinois Freedom to Work Act, 820 ILCS 90/1, *et seq.*, by prohibiting the use of restrictive covenants for employees earning below a specific salary threshold and requiring employers to make certain disclosures relative to post-employment restrictive covenants. In many respects, this legislation codifies existing case decisions in Illinois addressing post-employment restrictive covenants. S.B. 672 made its way to the Governor's desk on June 29, 2021, and he has 60 days to act on the bill. If signed into law, the bill's effective date is January 1, 2022, and it will apply to any restrictive covenants entered on or after that date.

First, it is important to understand to what types of agreements or entities S.B. 672 *does not* apply. The exclusion list is as follows:

1. governmental or quasi-governmental bodies;
2. confidentiality agreements;
3. agreements prohibiting the use or disclosure of trade secrets;
4. invention assignment agreements;
5. agreements acquiring or disposing of an ownership interest;
6. agreements requiring advance notice of termination of employment (provided that during the notice period the employee remains employed and compensated by the employer); or
7. agreements in which the employee agrees not to reapply for employment.

Second, S.B. 672 codifies existing caselaw by defining the phrases "adequate consideration" and "legitimate business interest." For a restrictive covenant to be supported by "adequate consideration," the employee must either (1) work for the employer for at least two years after signing the agreement or (2) receive professional or financial benefits in addition to his or her regular earnings. Assessing whether a restrictive covenant is supported by a "legitimate business interest" requires consideration of "the totality of facts and circumstances of the individual case which may include but are not limited to (1) the employee's exposure to customer relationships

or other employees; (2) the near-permanence of customer relationships; (3) the employees' acquisition, use, or knowledge of confidential information through their employment; and (4) the scope of time, place, or activity restrictions placed on the employee. S.B. 672 makes clear that "reasonableness is gauged by not just by some, but by all of the circumstances" and that "the same identical contract and restraint may be reasonable and valid under one set of circumstances and unreasonable and invalid under another set of circumstances." It also provides that the restriction cannot impose an undue hardship on the employee (not defined), nor can the restriction be injurious to the public.

Third, to ensure that employees are informed about their obligations under a restrictive covenant, S.B. 672 requires employers to advise employees in writing to consult with an attorney before entering into a restrictive covenant agreement and give employees at least 14 days to review before deciding whether to sign the agreement. However, an employee may voluntarily sign before the expiration of the 14-day period.

Fourth, S.B. 672 *prohibits*

1. restrictive covenants for employees covered by collective-bargaining agreements under the Illinois Public Labor Relations Act or the Illinois Education Labor Relations Act and employees in construction, except those serving in management, engineering, architectural, design, or sales functions;
2. noncompetition agreements for employees who earn or are expected to earn \$75,000 per year or less (This annual salary threshold increases to \$80,000 beginning January 1, 2027; \$85,000 beginning January 1, 2032; and \$90,000 beginning January 1, 2037.);
3. nonsolicitation agreements for employees who earn or are expected to earn \$45,000 per year or less (This annual salary threshold increases to \$47,500 beginning January 1, 2027; \$50,000 beginning January 1, 2032; and \$52,500 beginning January 1, 2037. Nonsolicitation includes restricting an employee from soliciting for employment the employer's employees or from soliciting, for the purpose of selling products or services of any kind to, or from interfering with, the employer's clients, (prospective) vendors, (prospective) suppliers, or other business relationships.); and
4. restrictive covenant agreements with employees who lost their jobs due to the COVID-19 pandemic or other similar circumstances unless enforcement includes compensation equivalent to the employee's base salary for the period of enforcement, less any compensation through subsequent employment during the same period.

Finally, in terms of remedies, S.B. 672 permits employees who prevail in restrictive covenant enforcement claims filed by employers to recover all costs and reasonable attorneys' fees, in addition to any other appropriate relief. It also provides that the Illinois Attorney General may initiate an investigation if it has reasonable cause to believe that any person or entity is engaged in a practice prohibited by the Illinois Freedom to Work Act and may assess monetary penalties against employers in an amount up to \$5,000 for a first violation and up to \$10,000 for repeat violations.

Presuming that S.B. 672 becomes law, employers will need to assess whether, when, and to what extent a new post-employment restrictive covenant can be used on and after January 1, 2022. If such is permissible under the Illinois Freedom to Work Act, employers will need to ensure that

they comply with the notice provision and allow employees at least the statutory period to consider the agreement prior to signing.

For more information about employment and labor law, see CAUSES OF ACTION: EMPLOYMENT ACTIONS (IICLE®, 2021). Online Library subscribers can view it for free by clicking here [<https://www.iicle.com/iicleOnline/Detail/34180>] . If you don't currently subscribe to the Online Library, visit www.iicle.com/subscriptions [<http://www.iicle.com/subscriptions>] .