Non-Compete Laws: Illinois

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A Q&A guide to non-compete agreements between employers and employees for private employers in Illinois. This Q&A addresses enforcement and drafting considerations for restrictive covenants such as post-employment covenants not to compete and non-solicitation of customers and employees. Federal, local, or municipal law may impose additional or different requirements. Answers to questions can be compared across a number of jurisdictions (see Non-Compete Laws: State Q&A Tool).

OVERVIEW OF STATE NON-COMPETE LAW

1. If non-competes in your jurisdiction are governed by statute(s) or regulation(s), identify the state statute(s) or regulation(s) governing:

- Non-competes in employment generally.
- Non-competes in employment in specific industries or professions.

GENERAL STATUTE AND REGULATION

Effective January 1, 2017, the Illinois Freedom to Work Act prohibits non-compete agreements between an employer and low-wage employees (820 ILCS 90/1 to 90/10).

A low-wage employee is an employee who earns the greater of:

- The hourly rate equal to the minimum wage that applicable federal, state, or local minimum wage law requires.
- $13.00 per hour.

(820 ILCS 90/5.)

Because the current minimum wage is $7.25 per hour federally, $8.25 per hour in the state of Illinois, and $10.50 per hour in the city of Chicago, in practice, the Act applies to non-compete agreements between employers and any employee who makes $13.00 or less per hour.

Under the Act, a non-compete agreement entered into on or after January 1, 2017 is illegal and void if it restricts a low-wage employee from performing any of the following:

- Any work for another employer for a specified period of time.
- Any work in a specified geographical area.
- Work for another employer that is similar to the low-wage employee's work for the employer included as a party to the agreement.

(820 ILCS 90/5, 90/10.)

Illinois has no statute or regulation governing non-compete agreements in employment for employees who make over $13.00 per hour.

INDUSTRY- OR PROFESSION-SPECIFIC STATUTE OR REGULATION

Lawyers: Ill. R. of Prof'l Conduct 5.6

The Illinois Rules of Professional Conduct govern non-compete agreements for lawyers (IL R S CT RPC Rule 5.6).

Broadcasters: 820 Ill. Comp. Stat. 17/10(a)

Section 10 of the Illinois Broadcast Industry Free Market Act governs non-compete agreements for broadcasting industry employees (820 ILCS 17/10(a)).

Government Contractors: 30 Ill. Comp. Stat. 500/50-25

Section 50-25 of the Illinois Procurement Code addresses non-compete provisions that bar parties from bidding on contracts with state agencies (30 ILCS 500/50-25).

2. For each statute or regulation identified in Question 1, identify the essential elements for non-compete enforcement and any absolute barriers to enforcement identified in the statute or regulation.

GENERAL STATUTE AND REGULATION

Illinois prohibits non-compete agreements between an employer and low-wage employees (see Question 1).

A non-compete agreement entered into after January 1, 2017 is illegal and void if it restricts a low-wage employee from performing any of the following:

- Any work for another employer for a specified period of time.
- Any work in a specified geographical area.
- Work for another employer that is similar to the low-wage employee's work for the employer included as a party to the agreement.

(820 ILCS 90/5 and 90/10.)

Illinois has no statute or regulation governing non-compete agreements in employment for employees who make over $13.00 per hour.

COMMON LAW

Illinois courts will only enforce a non-compete agreement if it is:

- Ancillary to either a valid contract or relationship.
- Supported by adequate consideration.
- Reasonably necessary to protect the legitimate business interest of the employer.

(*Reliable Fire Equip. Co. v. Arredondo*, 2011 IL 111871, ¶¶16 - 17 (Ill. 2011); *Brown & Brown, Inc. v. Mudron*, 379 Ill. App. 3d 724, 727 (2008).)

INDUSTRY- OR PROFESSION-SPECIFIC STATUTE OR REGULATION

Lawyers: Ill. R. of Prof'l Conduct 5.6

A lawyer cannot offer or make a:

- Partnership or employment agreement restricting lawyers from practicing law after ending the relationship, except for an agreement about retirement benefits.
- Settlement agreement restricting lawyers from practicing law.

(IL R S CT RPC 5.6; *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill.2d 460, 480 (1998).)

Broadcasters: 820 Ill. Comp. Stat. 17/10(a)

A broadcasting industry employment contract may not contain a post-employment non-compete provision (820 ILCS 17/10(a)).

However, non-compete provisions are enforceable if:

- The provision only covers the contract term.
- The employee breached the employment contract.

(820 ILCS 17/10(b).)

Government Contractors: 30 Ill. Comp. Stat. 500/50-25

An Illinois employer is guilty of a felony if the employer offers to pay money or any other valuable thing:

- To induce an employee not to bid for a state contract.
- As payment for not having bid on a state contract.

(30 ILCS 500/50-25.)

Therefore, a non-compete provision is void if it prohibits parties from bidding on state government contracts (*Health Prof'ls, Ltd. v. Johnson*, 339 Ill. App. 3d 1021, 1038 (2003)).

ENFORCEMENT CONSIDERATIONS

3. If courts in your jurisdiction disfavor or generally decline to enforce non-competes, please identify and briefly describe the key cases creating relevant precedent in your jurisdiction.

Effective January 1, 2017, the Illinois Freedom to Work Act prohibits non-compete agreements between an employer and low-wage employees (see Question 1). Illinois courts have not yet addressed this Act.

Illinois courts generally disfavor non-competes as a restraint of trade. However, Illinois courts enforce non-compete agreements if they are:

- Reasonable.
- Supported by adequate consideration.

(*Reliable Fire Equip. Co.*, 2011 IL 111871, ¶¶16-17.)

A non-compete is reasonable if it:

- Is ancillary to a valid employment relationship.
- Is no greater than required for the protection of a legitimate business interest of the employer.
- Does not impose an undue hardship on the employee.
- Is not harmful to the public.

(*Reliable Fire Equip. Co.*, 2011 IL 111871, ¶¶16-17, 17 n.2.)

Whether an employer has a legitimate business interest worthy of protection depends on the totality of the circumstances. When evaluating each case on its own particular facts, Illinois courts consider whether:

- The employer's customer relationships are near permanent.
- The employee acquired confidential information while working for the employer.
- The type of activity restriction, its duration and its geographic scope are appropriately tailored to the employer's interest.

(*Reliable Fire Equip. Co.*, 2011 IL 111871, ¶43.)

According to the Second District of the Appellate Court of Illinois, *Reliable Fire* should be applied "retroactively and proactively" to both:

- Future non-compete cases.
- Pending non-compete cases filed before the *Reliable Fire* decision.

(*Hafferkamp v. Llorca*, 2012 IL App (2d) 100353-U, ¶17 (2012).)

4. Which party bears the burden of proof in enforcement of non-competes in your jurisdiction?

Under Illinois law, the employer bears the burden of proof when enforcing a non-compete (*Shorr Paper Prods., Inc. v. Frary*, 74 Ill. App. 3d 498, 501-05 (1979)).

5. Are non-competes enforceable in your jurisdiction if the employer, rather than the employee, terminates the employment relationship?

The Illinois Freedom to Work Act prohibits non-compete agreements between an employer and low-wage employees (see Question 1).

The Act does not contain further guidance for situations where the employer terminates the employment relationship.

For employees who are not low-wage employees, under Illinois common law, non-competes are enforceable if the employer terminated employment in good faith and with good cause (*Rao v. Rao*, 718 F.2d 219, 222-23 (7th Cir. 1983)).

BLUE PENCILING NON-COMPETES

6. Do courts in your jurisdiction interpreting non-competes have the authority to modify (or "blue pencil") the terms of the restrictions and enforce them as modified?

For employees who are not low-wage employees, Illinois courts may reform or blue pencil a non-compete agreement and enforce it as modified (*Arpac Corp. v. Murray*, 226 Ill. App. 3d 65 (1992)).

However, Illinois courts do not modify provisions in a non-compete agreement if the terms of the original restraint are especially unfair, even if the parties expressly authorized modifications (*Eichmann v. Nat'l Hosp. & Health Care Servs., Inc.*, 308 Ill. App. 3d 337, 346-48 (1999)).

CHOICE OF LAW PROVISIONS

7. Will choice of law provisions contained in non-competes be honored by courts interpreting non-competes in your jurisdiction?

Generally, Illinois courts enforce contractual choice-of-law provisions unless either:

- The provision violates the public policy of a state with a materially greater interest in the dispute.
- The parties and contract do not have a substantial relationship with the chosen state.

(*Integrated Genomics, Inc. v. Kyrpides*, 2010 WL 375672, at *6 (N.D. Ill. Jan. 26, 2010); *Int'l Surplus Lines Ins. Co. v. Pioneer Life Ins. Co.*, 209 Ill. App. 3d 144, 153 (1990).)

REASONABLENESS OF RESTRICTIONS

8. What constitutes sufficient consideration in your jurisdiction to support a non-compete agreement?

For employees who are not low-wage employees, under Illinois law, an act or promise is sufficient consideration if it either:

- Benefits one party.
- Hurts one party.

(*Bires v. WalTom, LLC*, 662 F. Supp. 2d 1019, 1028 (N.D. Ill. 2009).)

An Illinois Court of Appeals found that absent other consideration, two years of employment is required for a non-compete agreement to be deemed supported by adequate consideration, even where the employee:

- Signed the non-compete agreement as a condition to his employment offer.
- Voluntarily resigned.

(*Fifield v. Premier Dealer Servs., Inc.*, 2013 IL App (1st) 120327, ¶19 (2013).)

However, federal district judges disagree about whether the two-year minimum in *Fifield* is binding. For example:

- In *Bankers Life & Casualty v. Miller* the court held that *Fifield* was not binding and there is no bright-line test (2015 WL 515965, at *3 (N.D. Ill. Feb. 6, 2015)).
- In *Cumulus Radio Corp. v. Olson* the court held that 21 months of employment was sufficient for consideration for a non-compete (80 F. Supp. 3d 900, 909 (C.D. Ill. 2015)).
- In *Montel Aetnastak, Inc. v. Miessen* the court held that 15 months of employment was sufficient consideration (998 F. Supp. 2d 694, 716 (N.D. Ill. 2014)).
- In *Instant Tech., LLC v. DeFazio* the court held that *Fifield* was binding and at-will employment of less than two years was not sufficient consideration (40 F. Supp. 3d 989, 1010-11 (N.D. Ill. 2014)).
- In *Traffic Tech, Inc. v. Kreiter* the court held that the Illinois Supreme Court is unlikely to adopt *Fifield*'s two-year bright-line rule in assessing whether an employee was employed for a substantial period of time so as to establish adequate consideration to support a post-employment restrictive covenant (2015 WL 9259544, at *5 (N.D. Ill. Dec. 18, 2015)).

Two Illinois state appellate courts addressed *Fifield* as follows:

- In *Prairie Rheumatology v. Maria Francis*, the court:
  - found that it is binding; and
  - held that 19 months of continued employment was not sufficient.
- (2014 IL App (3d) 140338, ¶16 (2014).)
- In *McInnis v. OAG Motorcycle Ventures, Inc.*, the court held that *Fifield*'s two-year minimum controls when the employee is not given any additional consideration for the non-compete agreement (2015 IL App (1st) 142644, ¶38 (2015)).

9. What constitutes a reasonable duration of a non-compete restriction in your jurisdiction?

Effective January 1, 2017, the Illinois Freedom to Work Act prohibits non-compete agreements between an employer and low-wage employees, including non-competes that restrict a low-wage employee from any work for another employer for a specified period of time (see Question 1).

For employees who are not low-wage employees, Illinois courts consider several factors to determine if a non-compete provision is reasonable, including:

- The length of time for the employer to get new clients (*Eichmann*, 308 Ill. App. 3d at 346).
- Hardship to the employee (*Lawrence & Allen, Inc. v. Cambridge Human Res. Grp., Inc.*, 292 Ill. App. 3d 131, 138 (1997)).
- The non-compete's effect on the public (*Lawrence & Allen*, 292 Ill. App. 3d at 138).

Illinois courts found the following non-competes to be reasonable:

- A two-year non-compete provision for a salesperson when it took the employer a long time to bring in and maintain clients (*Millard Maint. Serv. Co. v. Bernero*, 207 Ill. App. 3d 736, 749-50 (1990)).
- A five-year non-compete provision against a doctor when it took a clinic ten years to establish a client base (*Mohanty v. St. John Heart Clinic*, 225 Ill.2d 52, 77 (2006)).

Illinois courts found the following non-competes to be unreasonable:

- A two-year non-compete prohibition that was overbroad (*Arpac Corp.*, 226 Ill. App. 3d 65 at 78-79).
- A non-compete restriction exceeding one year when all confidential information a former employee learned was useless after one year (*Unisource Worldwide, Inc. v. Carrara*, 244 F. Supp. 2d 977, 984-85 (C.D. Ill. 2003)).
- A non-compete convent providing that the former employee could not "engage in any activity for or on behalf of Employer's competitors, or engage in any business that competes with Employer" (*Cambridge Eng'g, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 443-52 (Ill. App. Ct. 2007)).
- A covenant prohibiting a former employee from "engaging in any business competing with the business of" the plaintiff because that restriction impermissibly prohibits the former employee from working in any capacity, or associating in any way, with any of the plaintiff's competitors (*Triumph Packaging Grp. v. Ward*, 834 F. Supp. 2d 796, 801-814 (N.D. Ill. 2011)).

Even where the parties incorporate express language allowing for modification into their agreement, Illinois courts should refuse to modify an unreasonable restrictive covenant "not merely because it is unreasonable, but where the degree of unreasonableness renders it unfair," for example when drastic modifications would be necessary and are tantamount to fashioning a new agreement (*Eichmann*, 308 Ill. App. 3d at 348-49).

10. What constitutes a reasonable geographic non-compete restriction in your jurisdiction?

Effective January 1, 2017, the Illinois Freedom to Work Act prohibits non-compete agreements between an employer and low-wage employees, including non-competes that restrict a low-wage employee from performing any work in a specified geographical area (see Question 1).

For employees who are not low-wage employees, Illinois courts do not enforce geographic restraints that are broader than necessary to protect the employer's interests (*AssuredPartners, Inc. v. Schmitt*, 2015 IL App (1st) 141863, ¶35 (2015); *Arpac Corp.*, 226 Ill. App. 3d at 75-76).

Illinois courts consider if the geographic restriction is the same as the area where the employer does business (*Cambridge Eng'g, Inc.*, 378 Ill. App. 3d at 448).

11. Does your jurisdiction regard as reasonable non-competes that do not include geographic restrictions, but instead include other types of restrictions (such as customer lists)?

CUSTOMER RELATIONSHIP RESTRICTIONS

Effective January 1, 2017, the Illinois Freedom to Work Act prohibits non-compete agreements between an employer and low-wage employees, including non-competes that restrict a low-wage employee from performing work for another employer that is similar to the employee's work for the employer that is party to the agreement (see Question 1).

For non-competes between an employer and an employee who is not a low-wage employee, an activity restriction meant to protect customer relationships is a reasonable alternative to a geographic limit.

The restriction:

- Must be reasonably related to protecting customer relationships developed by the employee while working for the employer.
- Generally should not extend to customers that the former employee never:
  - solicited; or
  - contacted.

(*Lawrence & Allen*, 292 Ill. App. 3d at 138-39.)

ANTI-RAIDING AGREEMENTS

Under Illinois law, an employer may limit a former employee's ability to recruit former co-workers, because employers have an interest in maintaining a stable workforce. (*Arpac Corp.*, 226 Ill. App. 3d at 76-77.)

12. Does your jurisdiction regard as reasonable geographic restrictions (or substitutions for geographic restrictions) that are not fixed, but instead are contingent on other factors?

Illinois prohibits non-compete agreements between an employer and low-wage employees, including non-competes that restrict a low-wage employee from performing work in a specified geographical area, and work for another employer that is similar to the employee's work for the employer that is party to the agreement (see Question 1).

For non-compete agreements between employers and employees who are not low-wage employees, geographic restrictions are generally based on the employer's scope of business. Illinois courts upheld covenants without geographic restrictions for employers doing business nationwide to keep a former employee from taking the employer's customers. (*Donald McElroy, Inc. v. Delaney*, 72 Ill. App. 3d 285, 294 (1979).)

13. If there is any other important legal precedent in the area of non-compete enforcement in your jurisdiction not otherwise addressed in this survey, please identify and briefly describe the relevant cases.

There is no other important legal precedent in the area of non-compete enforcement in Illinois.

REMEDIES

14. What remedies are available to employers enforcing non-competes?

Effective January 1, 2017, the Illinois Freedom to Work Act prohibits non-compete agreements between an employer and low-wage employees (see Question 1).

In non-competes with employees who are not low-wage employees, for an employee's breach of a non-compete covenant, a court may award the employer:

- Monetary damages.
- Injunctive relief.
- Liquidated damages.
- Attorneys' fees and costs.

(*Prairie Eye Ctr., Ltd. v. Butler*, 329 Ill. App. 3d 293, 303-05 (2002).)

A court awards liquidated damages and attorneys' fees only if the non-compete agreement has a clause allowing for them (*Mudron*, 379 Ill. App. 3d at 725-29).

Liquidated damages may be awarded instead of lost profits. Courts do not award both liquidated damages and injunctive relief if the non-compete agreement states that liquidated damages are the only remedy for breach (*Brian McDonagh S.C. v. Moss*, 207 Ill. App. 3d 62, 65 (1990)).

For a damages award, the employer must show:

- That the employer suffered damages.
- A reasonable basis for damages calculations.

(*Brown & Brown, Inc. v. Ali*, 592 F. Supp. 2d 1009, 1048-49 (N.D. Ill. 2009).)

In *Ali*, the court held that an employer may recover lost profits if they are proven with a reasonable degree of certainty (592 F. Supp. 2d at 1049). An employer may not recover if the amount lost is unknown.

"As a general rule, punitive damages are not recoverable for breach of contract" (*Morrow v. L.A. Goldschmidt Associates, Inc.*, 492 N.E.2d 181, 183 (IL 1986)). However, they can be awarded if the breach amounts to an independent tort, such as tortious interference. (*Morrow*, 492 N.E.2d at 184. See *RKI, Inc. v. Grimes*, 200 F. Supp. 2d 916, 928 (N.D. Ill. 2002)).

15. What must an employer show when seeking a preliminary injunction for purposes of enforcing a non-compete?

Effective January 1, 2017, the Illinois Freedom to Work Act prohibits non-compete agreements between an employer and low-wage employees (see Question 1).

For non-competes with employees who are not low-wage employees, Illinois employers must show the following to obtain a preliminary injunction:

- A clearly defined right to be protected.
- Irreparable injury without an injunction.
- That there is no adequate remedy at law.
- A likelihood of success on the merits of the case.

(*Mohanty*, 225 Ill.2d at 62.)

Under Illinois law, an employer does not need to show actual loss. An employer only needs to prove ongoing competition. (*Hess Newmark Owens Wolf, Inc. v. Owens*, 415 F.3d 630, 633 (7th Cir. 2005).)

OTHER ISSUES

16. Apart from non-competes, what other agreements are used in your jurisdiction to protect confidential or trade secret information?

NON-SOLICITATION AGREEMENTS

The Illinois Freedom to Work Act prohibits non-compete agreements between an employer and low-wage employees (see Question 1), but does not address non-solicitation agreements.

Generally, Illinois courts enforce non-solicitation agreements if the terms are:

- Reasonable.
- Necessary to protect an employer's legitimate business interest.

Courts are hesitant to enforce provisions that prevent former employees from soliciting customers with whom the employees never had direct or actual contact. (*AssuredPartners*, 2015 IL App (1st) 141863, ¶¶38-42; *Lawrence & Allen*, 292 Ill. App. 3d at 138-39.)

CONFIDENTIALITY AND NONDISCLOSURE PROVISIONS

The Illinois Freedom to Work Act prohibits non-compete agreements between an employer and low-wage employees (see Question 1), but does not address confidentiality and nondisclosure provisions.

Confidentiality and nondisclosure provisions restrict an employee's ability to disclose certain information during and after employment. Under the Illinois Trade Secrets Act, a nondisclosure provision without time or geographic restrictions is enforceable (765 ILCS 1065/8(b)(1)).

For more information on trade secrets in Illinois, see State Q&A, Trade Secret Laws: Illinois (3-506-3335).

RESTRICTIVE COVENANTS ANCILLARY TO A SALE OF BUSINESS

Illinois courts evaluate restrictive covenants related to a sale of a business more leniently than employment non-competes, because the parties bargain at arm's length (*Diepholz v. Rutledge*, 276 Ill. App. 3d 1013, 1016 (1995)).

A covenant related to a sale of business only needs to be reasonable in:

- Duration.
- Geographic area.
- Scope.

(*Loewen Grp. Int'l, Inc. v. Haberichter*, 912 F. Supp. 388, 393 (N.D. Ill. 1996).)

17. Is the doctrine of inevitable disclosure recognized in your jurisdiction?

Illinois recognizes the doctrine of inevitable disclosure (765 ILCS 1065/3(a)). To prove a trade secret misappropriation claim under this doctrine, an employer must show that the former employee's new employment will inevitably lead him to use the former employer's trade secrets in his new position (*PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1269 (7th Cir. 1995)). This is true even if the employee did not take anything containing the confidential information (*Strata Mktg., Inc. v. Murphy*, 317 Ill. App. 3d 1054, 1069-71 (2000)).

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