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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

For non-compete agreements entered into on or after January 1, 2022, the Illinois Freedom to Work Act (IFWA) (820 ILCS 90/1 to 90/10) prohibits non-compete agreements between an employer and:

- Employees earning $75,000 or less per year.
- Employees the employer terminates, furloughs, or lays off due to business circumstances or governmental orders related to the COVID-19 pandemic or under similar circumstances, unless the employer 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.
- Employees who are:
  - covered by a collective bargaining agreement under the Illinois Public Relations Act or Illinois Educational Labor Relation Act; or
  - employed in construction, unless the employee performs certain functions or is a shareholder, owner, or partner of the employer.

(820 ILCS 90/10.)

A non-compete under the IFWA is an agreement between the employer and employee that restricts the employee from performing:

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

It also means an agreement between an employer and employee that imposes financial adverse consequences on the employee if the employee engages in competitive activities after the employee's employment with the employer terminates. (820 ILCS 90/5.)

A non-compete does not include:

- A non-solicitation agreement. The IFWA expressly covers non-solicitation agreements separately from non-competes (see Question 16: Non-Solicitation Agreements).
- A confidentiality agreement.
- An agreement prohibiting disclosure of trade secrets or inventions.
- Invention assignment agreements or covenants.

- Covenants or agreements entered into by a person purchasing or selling the goodwill of a business or otherwise disposing of an ownership interest.
- Clauses or an agreement between an employer and an employee requiring advance notice of termination of employment where the employee remains employed and receives compensation during the notice period.
- An agreement that an employee agrees not to reapply for employment to the same employer after the employee's termination.

(820 ILCS 90/5.)

Industry- or Profession-Specific Statute or Regulation

Lawyers: IL R S CT RPC Rule 5.6

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

Broadcasters: 820 ILCS 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 ILCS 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).

Construction Workers: 820 ILCS 90/10

For non-compete agreements entered into on or after January 1, 2022, a non-compete is void and illegal for individuals employed in construction. This 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 employer. (820 ILCS 90/10(d).)

Nurse Staffing Agencies: 225 ILCS 510/14(g)

As of July 1, 2022, nurse staffing agencies may not enter into:

- Non-competes with nurses or certified nurse aides.
- A contract with any employee or health care facility requiring the payment of liquidated damages, conversion fees, employment fees, buy-out fees, placement fees, or other compensation if the health care facility hires the employee on as a permanent employee.

(225 ILCS 510/3 and 510/14(g).)

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

For non-compete agreements entered into on or after January 1, 2022, Illinois prohibits non-compete agreements between an employer and:

- Employees earning $75,000 or less per year.
- Employees the employer terminates, furloughs, or lays off due to business circumstances or governmental orders related to the COVID-19 pandemic or under similar circumstances, unless the employer 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.
- Employees who are:
  - covered by a collective bargaining agreement under the Illinois Public Relations Act or Illinois Educational Labor Relation Act; or
  - employed in construction, unless the employee performs certain functions or is a shareholder, owner, or partner of the employer.

(820 ILCS 90/10.)

A non-compete agreement entered into on or after January 1, 2022, is void unless:

- The employee receives adequate consideration.
- The agreement is ancillary to a valid employment relationship.
- The agreement is no greater than is required for the protection of a legitimate business interest of the employer.
- The agreement does not impose undue hardship on the employee.
- The agreement is not injurious to the public.

(820 ILCS 90/15.)

A non-compete agreement entered into on or after January 1, 2022, is illegal and void unless:

- The employer advises the employee in writing to consult with an attorney before entering into the agreement.

- The employer provides the employee with a copy of the agreement at least 14 days before the commencement of the employee's employment or the employer provides the employee with at least 14 days to review the agreement. An employer is in compliance with if the employee voluntarily elects to sign the agreement before the expiration of the 14–day period.

(820 ILCS 90/20.)

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.
- Reasonable.
- 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, 728 (2008).)

Courts determine the reasonableness of a non-compete agreement by considering whether the agreement:

- Is no greater in geographic and temporal scope than required to protect the employer's legitimate business interest.
- Does not impose undue hardship on the employee.
- Is not injurious to the public.

(*Reliable Fire Equip. Co.*, 2011 IL 111871, ¶17; *Brown & Brown, Inc.*, 379 Ill. App. 3d at 728.)

Industry- or Profession-Specific Statute or Regulation

Lawyers: IL R S CT RPC Rule 5.6

A lawyer cannot offer or make a:

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

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

Broadcasters: 820 ILCS 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 ILCS 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)).

Construction Workers: 820 ILCS 90/10(d)

For non-competes entered into on or after January 1, 2022, a non-compete agreement is void and illegal with respect to individuals employed in construction. This does not apply to construction employees who:

- Primarily perform management, engineering or architectural, design, or sales functions for the employer.
- Are shareholders, partners, or owners in any capacity of the employer.

(820 ILCS 90/10(d).)

Nurse Staffing Agencies: 225 ILCS 510/14(g)

As of July 1, 2022, nurse staffing agencies may not enter into:

- Non-competes with nurses or certified nurse aides.
- A contract with any employee or health care facility requiring the payment of liquidated damages, conversion fees, employment fees, buy-out fees, placement fees, or other compensation if the health care facility hires the employee on as a permanent employee.

(225 ILCS 510/3 and 510/14(g).)

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.

For non-compete agreements entered into on or after January 1, 2022, the Illinois Freedom to Work Act (IFWA) prohibits non-compete agreements between an employer and employees earning $75,000 or less per year, working in construction, working under a collective bargaining agreement, or laid off or furloughed due to COVID-19 or similar circumstances without appropriate compensation (see Question 1). Illinois courts have not yet addressed the IFWA.

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.)

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, ¶17.)

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 facts including, but not limited to, 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, 502 (1979)).

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

For non-compete agreements entered into on or after January 1, 2022, the Illinois Freedom to Work Act (IFWA) prohibits non-compete agreements between an employer and employees making $75,000 or less per year, working in construction, working under a collective bargaining agreement, or laid off or furloughed due to COVID-19 or similar circumstances without appropriate compensation (see Question 1). The IFWA does not contain further guidance for situations where the employer terminates the employment relationship.

For employees who are not excluded under the IFWA, under Illinois common law, non-competes are enforceable if the employer terminated employment in good faith (*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?

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, 79-80 (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)).

For non-compete agreements entered into on or after January 1, 2022, in some circumstances, a court may choose to reform or sever provisions of a non-compete agreement rather than hold the agreement unenforceable. The court can consider the following factors:

- 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 reformation.
- Whether the parties included a clause authorizing modifications in their agreement.

(820 ILCS 90/35.)

Choice of Law Provisions

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

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

- Application of the chosen state's law violates the public policy of a state with a materially greater interest in the dispute and that state's law would be applied absent a choice-of-law clause.
- The parties and contract do not have a substantial relationship with the chosen state and there is no other reasonable basis for the parties' choice.

(*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 excluded under the Illinois Freedom to Work Act, an act or promise is sufficient consideration under Illinois law 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 an 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, federal courts have held that:

- One year of employment could be sufficient consideration under certain circumstances *(Stericycle, Inc. v. Simota*, 2017 WL 4742197, at *5 (N.D. Ill. Oct. 20, 2017)).
- *Fifield* was not binding and there is no bright-line test (*Bankers Life & Casualty v. Miller*, 2015 WL 515965, at *3 (N.D. Ill. Feb. 6, 2015)).
- 21 months of employment was sufficient for consideration for a non-compete (*Cumulus Radio Corp. v. Olson*, 80 F. Supp. 3d 900, 909 (C.D. Ill. 2015)).
- 15 months of employment was sufficient consideration (*Montel Aetnastak, Inc. v. Miessen*, 998 F. Supp. 2d 694, 716 (N.D. Ill. 2014)).
- *Fifield* was binding and at-will employment of less than two years was not sufficient consideration (*Instant Tech., LLC v. DeFazio*, 40 F. Supp. 3d 989, 1010-11 (N.D. Ill. 2014)).
- 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 (*Traffic Tech, Inc. v. Kreiter*, 2015 WL 9259544, at *5 (N.D. Ill. Dec. 18, 2015)).

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

- The Third District Appellate Court:

  - found that the employee's restrictive covenant was unenforceable; and
  - held that 19 months of continued employment was not sufficient consideration.

  (*Prairie Rheumatology v. Maria Francis*, 2014 IL App (3d) 140338, ¶¶14-19 (2014).)

- The First District Appellate Court, Fourth Division held that *Fifield*'s two-year minimum controls when the employee is not given any additional consideration for the non-compete agreement (*McInnis v. OAG Motorcycle Ventures, Inc.*, 2015 IL App (1st) 142644, ¶38 (2015)).

For non-compete agreements entered into on or after January 1, 2022, a non-compete agreement is void without adequate consideration. Adequate consideration means either:

- The employee worked for the employer for at least 2 years after the employee signed an agreement containing a non-compete agreement.
- The employer otherwise provided consideration adequate to support an agreement to not compete. This consideration can consist of:
  - a period of employment plus additional professional or financial benefits; or
  - merely professional or financial benefits adequate by themselves.

(820 ILCS 90/5 and 90/15.)

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

For non-compete agreements entered into on or after January 1, 2022, the Illinois Freedom to Work Act (IFWA) prohibits non-compete agreements between an employer and employees earning $75,000 or less per year, working in construction, working under a collective bargaining agreement, or laid off or furloughed due to COVID-19 or similar circumstances without appropriate compensation (see Question 1). Under the IFWA, a non-compete is not enforceable if it is greater than required to protect a legitimate business interest of the employer. The IFWA does not contain specific duration restrictions. (820 ILCS 90/7.)

For employees who are not excluded under the IFWA, 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 customers (*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, 77-78 (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, 982-83 (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 plaintiff's business for 24 months 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, 814-15 (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," such as when drastic modifications would be necessary

and are tantamount to fashioning a new agreement (*Eichmann*, 308 Ill. App. 3d at 347-48).

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

For non-compete agreements entered into on or after January 1, 2022, the Illinois Freedom to Work Act (IFWA) prohibits non-compete agreements between an employer and employees earning $75,000 or less per year, working in construction, working under a collective bargaining agreement, or laid off or furloughed due to COVID-19 or similar circumstances without appropriate compensation (see Question 1). Under the IFWA, a non-compete is not enforceable if it is greater than required to protect a legitimate business interest of the employer. The IFWA does not contain specific geographic restrictions. (820 ILCS 90/7.)

For employees who are not excluded under the IFWA, 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, ¶35-36 (2015); *Arpac Corp.*, 226 Ill. App. 3d at 75-76).

Illinois courts consider whether 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

For non-compete agreements entered into on or after January 1, 2022, the Illinois Freedom to Work Act (IFWA) prohibits non-compete agreements between an employer and employees earning $75,000 or less per year, working in construction, working under a collective bargaining agreement, or laid off or furloughed due to COVID-19 or similar circumstances without appropriate compensation (see Question 1). Under the IFWA, a non-compete agreement entered into on or after January 1, 2022 is illegal and void if it does more than required to protect the legitimate business interest of the employer. To determine the legitimate business interest of the employer, the totality of the facts and circumstances of the individual case will be considered. Factors that may be considered include, but are not limited to:

- The employee's exposure to the employer's customer relationships or other employees.
- The near-permanence of customer relationships.
- The employee's acquisition, use, or knowledge of confidential information through the employee's employment.
- The time restrictions.
- The place restrictions.
- The scope of the activity restrictions.

(820 ILCS 90/7 and 90/15.)

The IFWA also prohibits employers from entering into non-solicitation agreements on or after January 1, 2022 with any employee who earns $45,000 or less per year or was laid off or furloughed due to COVID-19 or similar circumstances without appropriate compensation. Non-solicitation agreements under the IFWA include agreements not to:

- Solicit the employer's clients for the selling of products or services.
- Interfere with the employer's relationships with their clients or prospective clients.

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

For non-competes between an employer and an employee who is not excluded under the IFWA, 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

The IFWA prohibits employers from entering into non-solicitation agreements on or after January 1, 2022, with employees who earn $45,000 or less per year or were laid

off or furloughed due to COVID-19 or similar circumstances without appropriate compensation. Under the IFWA, a non-solicitation agreement includes restricting an employee from soliciting the employer's employees for employment. (820 ILCS 90/5 and 90/10(b).)

Under Illinois common 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?

For non-compete agreements entered into on or after January 1, 2022, the Illinois Freedom to Work Act (IFWA) prohibits non-compete agreements between an employer and employees earning $75,000 or less per year, working in construction, working under a collective bargaining agreement, or laid off or furloughed due to COVID-19 or similar circumstances without appropriate compensation (see Question 1).

For non-compete agreements between employers and employees who are not excluded under the IFWA, geographic restrictions are generally based on the employer's scope of business. Illinois courts have upheld covenants prohibiting former employees from soliciting the employer's customers without geographic restrictions for employers doing business nationwide to keep a former employee from taking the employer's customers. (820 ILCS 90/7 and 90/15; *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?

For non-compete agreements entered into on or after January 1, 2022, the Illinois Freedom to Work Act prohibits non-compete agreements between an employer and employees earning $75,000 or less per year, working in construction, working under a collective bargaining agreement, or laid off or furloughed due to COVID-19 or similar circumstances without appropriate compensation (see Question 1). Under the IFWA, an employee who prevails in an employer's arbitration or action to enforce a non-compete or a non-solicitation agreement, the employee is entitled to recover costs and attorneys' fees in addition to any other appropriate relief (820 ILCS 90/25).

In non-competes with employees who are not excluded under the IFWA, 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).)

Courts will not award attorneys' fees and expenses without either:

- Specific statutory authority.
- A contractual provision requiring or allowing them.

(*Lozano v. Mayer*, 2008 WL 5243507 (Cir. Ct. Cook Cty. Apr. 17, 2008).)

Courts may award liquidated damages 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, 65-66 (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 (N.D. Ill. 2009).)

An employer may recover lost profits if they are proven with a reasonable degree of certainty. An employer may not recover if the amount lost is based on speculation or conjecture. (*Ali*, 592 F. Supp. 2d at 1048-49.)

"As a general rule, punitive damages are not recoverable for breach of contract" (*Morrow v. L.A. Goldschmidt Associates, Inc.*, 112 Ill. 2d 87, 94-95 (1986)). However,

courts may award them if the breach amounts to an independent tort, such as tortious interference. (*Morrow,* 112 Ill. 2d at 95; *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?

For non-compete agreements entered into on or after January 1, 2022, the Illinois Freedom to Work Act prohibits non-compete agreements between an employer and employees earning $75,000 or less per year, working in construction, working under a collective bargaining agreement, or laid off or furloughed due to COVID-19 or similar circumstances without appropriate compensation (see Question 1).

For non-competes with employees who are not excluded under the IFWA, 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

For non-solicitation agreements entered into on or after January 1, 2022, the Illinois Freedom to Work Act (IFWA) prohibits non-solicitation agreements with employees earning $45,000 or less per year. The IFWA imposes the same restrictions on non-solicitation agreements as non-compete agreements when they are related to furloughs or layoffs due to COVID-19. (See Question 1: General Statute and Regulation; 820 ILCS 90/10).

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 certain 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. A nondisclosure provision without time or geographic restrictions is enforceable under the Illinois Trade Secrets Act (765 ILCS 1065/8(b)(1)).

For more information on trade secrets in Illinois, see State Q&A, Trade Secret Laws: Illinois.

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 them to use the former employer's trade secrets in the employee's 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)).