SFBBG
Schoenberg | Finkel | Beederman | Bell | Glazer LLC

SENSIBLE SOLUTIONS

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We are comprised of seasoned and dedicated professionals who familiarize themselves with our clients' industries as well as their legal issues. We strive to maintain long-term client relationships by keeping our clients fully informed and respecting their time and business resources.

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Illinois Employment Law Update

Illinois continues to make significant changes in the area of employment law, as the state legislature enacted a series of significant measures in 2024. These new laws require a thorough evaluation of company policies and procedures regarding temporary employees and independent contractors, among several other considerations. They come with significant penalties, broaden avenues for private legal action, and, in certain instances, entail statutory double damages and legal fees. This active approach mimics the efforts often seen in states like California, which is known for setting precedents in employment law.

The Illinois Freelance Worker Protection Act.

The Illinois Freelance Worker Protection Act ("FWPA" or the "Act"), effective July 1, 2024, marks a significant step towards extending protections to independent contractors traditionally reserved for employees. Among other things, it imposes a requirement that contracts be written, mandates timely payments, and grants a private right of action to freelance workers for violations of the Act.

The FWPA defines a freelance worker as a "natural person who is hired or retained as an independent contractor by a contracting entity to provide products or services in Illinois or for a contracting entity located in Illinois," and who earns more than $500 annually. Notably, exclusions apply to construction workers and those classified as employees under the Illinois Wage Payment and Collections Act, highlighting the nuanced landscape of worker classification, an issue that is continually evolving under Illinois law.

Under the FWPA, contract terms between the company and freelance worker must be written and a hard or electronic copy of the contract must be provided to the freelance worker. Contracts that fall under the law must include the following components:

- The name and contact information of all parties;
- The products or services contracted for;
- The payment amount;
- The method of payment;
- The date by which the freelance worker must be paid; and
- The date by which the freelance worker must submit an invoice, if required by the contracting entity.

If the contract has no payment due date, the contracting entity must pay the freelance worker within 30 days of the date the contract or services were provided.

To enforce their rights, freelance workers can submit evidence of a violation of the Act to the Illinois Department of Labor ("DOL"). Once notified of the claim, the contracting entity has 20 days to respond or risks a rebuttable presumption of fault in a civil action in the freelance worker's favor. Freelance workers may instead bypass this administrative remedy and initiate litigation in the first instance. The Act also permits class action claims.

Exposure for violations of the FWPA are significant. Failure to timely pay a freelance worker in accordance with the Act can result in damages up to twice the amount owed, and failure to furnish a copy of the contract alone can result in a penalty of the greater of $500 or the value of the agreement at issue. Freelance workers have two years from the date payment was due to file their respective claims and can recover reasonable attorneys' fees and costs in exercising their rights.

Illinois business and managers who utilize freelance workers should review their practices, policies, and current engagements, to ensure compliance with the Act prior to July 1, 2024. Existing contracts that satisfy the above requirements will be deemed to have complied with the FWPA.

Amendments to the Illinois Day and Temporary Labor Services Act.

Illinois enacted significant amendments to the Day and Temporary Labor Services Act ("DTLSA"), which generally governs staffing agencies and companies and their third-party clients. Temporary labor engaged in services of a professional or clerical nature is exempt from the DTLSA.

Under the DTLSA amendments, temporary workers who work at a single client company for 90 or more days during any 12-month period must be paid at least the same rate of pay as and must receive equivalent benefits as the lowest paid comparable employee. Companies who utilize staffing agencies must furnish to the staffing agency all information related to job duties and compensation, including benefits, upon request to facilitate compliance with this aspect of the DTLSA. Importantly, staffing agencies and client companies both bear liability under the DTLSA for wages to temporary workers.

The amendments further require that temporary workers be provided safety and hazard training on or before the first day at a worksite. Staffing companies and their clients share the responsibility to notify each other of current safety practices and any anticipated hazards temporary workers may face. Any training given to temporary workers cannot be charged to the worker and must be given in a language the worker understands. Temporary workers must also be given the Illinois Department of Labor hotline number to report safety hazards and concerns.

Temporary workers may also now refuse an assignment to a client company where the current direct employees are participating in a strike, lockout, or other labor dispute. Under the DTLSA, staffing companies must inform temporary workers of any labor dispute and client companies must in turn inform staffing agencies of any labor dispute to facilitate compliance with the DTLSA.

The DTLSA also increases registration fees for staffing companies to $3,000.00 and $750.00 per branch. Client companies must verify registration status with the Illinois Department of Labor prior to executing an agreement for staffing services.

Critically, the DTLSA expands the private right of action and now permits "interested parties" to initiate litigation over DTLSA violations. The DTLSA defines "interested parties" as "an organization that monitors or is attentive to compliance with public or worker safety laws, wage and hour requirements, or other statutory requirements." This includes governmental entities, and potentially labor unions and non-profits. As a result, we anticipate a substantial increase in litigation concerning the DTLSA.

A first-time violation of the DTLSA results in civil penalties up to $18,000. Subsequent violations can result penalties of between $250 to $7,500, per laborer per day. Because staffing companies and their clients/customers share certain liabilities under the DTLSA, both contracting entities are urged to undergo a comprehensive audit of their internal protocols to ensure compliance with DTLSA.

For more information or any questions, please contact Marc Pawlus at marc.pawlus@sfbbg.com or Adam Maxwell at adam.maxwell@sfbbg.com, or at (312) 648-2300.

FTC Issues Ban on Employment Noncompete Clauses for All Workers, Including Senior Executives

Case Victories

Norm Finkel, Rich Goldwasser and Marc Pawlus obtained a judgment in favor of SFBBG's client against a Chicago-based real estate developer in a breach of contract action. The case involved the developer's extensive delays in constructing a mixed-use development in Chicago's River North neighborhood in which SFBBG's client agreed to purchase commercial and residential space. The judgment in favor of SFBBG's client came after nearly three years of litigation and included prejudgment interest and attorneys' fees.

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Norm Finkel and Marc Pawlus obtained dismissals of three separate lawsuits against SFBBG's automotive dealership client. The plaintiffs claimed that SFBBG's client breached agreements to sell several luxury vehicles. In each case, the court held that the alleged contract was invalid and not enforceable, and dismissed the complaints against SFBBG's client.

SFBBG Files Petition for a Writ of Certiorari for Former Local Union President

SFBBG attorney Pat Deady has filed a petition for a writ of certiorari in the U.S. Supreme Court on behalf of a former local union president seeking to challenge decisions in the Chicago district and appellate courts dismissing her claims that her international union terminated her union membership without any notice of internal disciplinary charges against her and without affording her a fair hearing on any such violations. The former president claims that the International terminated her union membership in an effort to suppress her federal statutory free speech rights as a union member. The Supreme Court may decide later this spring whether to grant the former president's request for review.

Welcome Aboard!

The Firm is happy to announce the latest addition to our group of attorneys. Jeffery Heftman has joined the Litigation practice group as a partner.

Speaking Engagements

Adam Glazer and Adam Maxwell presented at the recent Electronics Representatives Association ("ERA") in Austin, TX in February 2024.

On April 18, Mike Kim did a review of pending Illinois legislative proposals which could affect condominium, common interest communities, home owner associations and residential cooperatives for the Association of Sheridan Road Condominium and Co-op Owners (ASCO), which represents and advocates for over 30 associations in Chicago's Edgewater community.

On May 6, Dan Beederman, legal counsel for the Manufacturers' Agents National Association ("MANA"), spoke to members on recent and pending legislation that could affect manufacturers' reps and manufacturers.

Dan Beederman also virtually presented sales representative statutes and other legislation in the US that relate to sales representatives to the "Legal Working Group" of IUCAB (a worldwide alliance of associations whose members are sales agents and independent sales representatives primarily in Europe) on May 9 at its annual conference in Vienna, Austria.

Published Articles

Adam Maxwell's article, "Illinois, Chicago overhaul paid leave laws to benefit workers," was published by the *Chicago Daily Law Bulletin* on February 14.

The *Chicago Daily Law Bulletin* published an article ("DM, text, email: Rule 102 allows contactless delivery of a lawsuit") written by Andrew Johnson on March 13.

On May 6, *Law360* published a piece written by Phil Zisook entited, "Ill. Justices' Ruling Answers Corporate Defamation Questions."

On April 23, 2024, the Federal Trade Commission (FTC) adopted a Final Rule banning the use of new noncompete clauses with all workers, including senior executives, regardless of the title or position of the worker. The vote followed the FTC's January 2023 announcement of a notice of proposed rulemaking to ban the use of noncompete clauses with workers. The FTC's lengthy Final Rule may be accessed here. SFBBG is closely tracking federal efforts to restrict the use of noncompete agreements in employment, including in our recent e-mail news blast immediately following the FTC's adoption of the Final Rule, as well as in our prior article discussing the May 2023 memorandum issued by the General Counsel of the National Labor Relations Board expressing the opinion that employee noncompete agreements violated the National Labor Relations Act. This article continues that coverage by addressing the Final Rule's key provisions and exceptions and discussing potential next steps that employers should consider.

What is the Final Noncompete Clause Rule?

The Final Rule provides that it will be considered an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act (FTC Act) for an employer to impose or enforce a "noncompete clause" with "workers" on or after the Final Rule's effective date. The Final Rule was published in the Federal Register on May 7, and will have an effective date of September 4. The Final Rule is a comprehensive ban on both new noncompete agreements as well as the enforcement of existing noncompete agreements. There is a limited exception for noncompete agreements in effect with "senior executives" as of the effective date of the Final Rule, allowing such noncompete agreements to remain in force.

How Are "Noncompete Clauses" Defined in the Final Rule?

A "noncompete clause" includes a "term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from (1) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (2) operating a business in the United States after the conclusion of the employment that includes the term or condition."

How are "Workers" Defined in the Final Rule?

A "worker" includes a person "who works or who previously worked, whether paid or unpaid, without regard to the worker's title or the worker's status … including, but not limited to, whether the worker is an employee, independent contractor, extern, intern, volunteer, apprentice, or a sole proprietor who provides service to a person." "Worker" also includes a person who works for a franchisee or a franchisor, but does not include a franchisee in the context of a franchisee-franchisor relationship.

Are "Senior Executives" Treated Differently Under the Final Rule?

The Final Rule bans the use or enforcement of existing noncompete agreements with workers, except for a limited exception applicable to "senior executives," defined as a worker earning more than $151,164 annually who is also in a "policy-making position" with respect to the business. Existing noncompete agreements can remain in force and effect for senior executives.

Are Other Types of Restrictive Covenants Barred Pursuant to the Final Rule?

A "noncompete clause" also includes "terms and conditions that require a worker to pay a penalty for seeking or accepting other work or starting a business after their employment ends." This may target "liquidated damages" or "forfeiture-for-competition" clauses that might impose "adverse financial consequences on a former employee expressly conditioned on the employee seeking or accepting other work or starting a business," or a "severance arrangement in which the worker is paid only if they refrain from competing" with the former employer.

The ban on "noncompete clauses" also will apply to terms of employment that restrain activity to such an extent that it would "function to prevent" a worker from accepting other work, or starting a new business, after their employment ends. Such "functional" noncompete clauses could include non-disclosure agreements, non-solicitation agreements, and no-hire agreements. For example, a non-disclosure agreement that prohibits a worker from disclosing any information the worker may obtain during employment, including publicly available information, may be improper because it could "function to prevent" the worker from joining another employer. Other restrictive covenants, including narrowly-tailored confidentiality or non-disclosure agreements that generally do not prohibit workers from accepting other employment, may still be permissible under the FTC's Final Rule.

Are There Other Exceptions to the Final Rule?

The Final Rule does not apply to noncompete agreements entered into as part of a sale of a business entity or its assets. Noncompete agreements may still be imposed as a condition of such a transaction.

Do Employers Have to Provide Notice to Affected Workers?

All employers are required to provide workers with noncompete agreements with "clear and conspicuous" notice by the Final Rule's September 4 effective date that the noncompete will not be enforced. The notice must identify the employer who imposed the noncompete, and the notice must be delivered to the worker by hand, by US Mail, by email, or by text message to the worker. A model notice created by the FTC can be accessed here.

Are There Legal Challenges to the FTC's Final Rule?

The Final Rule was approved in a 3-2 vote, with the FTC Commissioners split along party lines. The opposition argued the FTC lacked authority under the FTC Act to issue the regulation, and further that the Final Rule represents "arbitrary and capricious" decision-making. At least two separate lawsuits challenging the Final Rule were filed in the days immediately following its adoption.

What are the Next Steps for Businesses?

Employers with existing or potential noncompete agreements should prepare by reviewing the noncompete agreements and considering the impact of the Final Rule on the agreements. Employers should consider whether current workers may qualify as "senior executives" under the Final Rule and whether they should create noncompete agreements for such executives. Employers also should be prepared to provide the required notice to all current or former workers with noncompete agreements prior to the Final Rule's effective date. Finally, employers should analyze the scope of any current confidentiality clauses, nondisclosure agreements, forfeiture clauses, and non-solicitation clauses to ensure compliance with the Final Rule. SFBBG will continue to closely monitor these developments and is well-positioned to provide guidance and counseling.

Please contact Tedd Warden at (312) 775-3616 or tedd.warden@sfbbg.com for more information.