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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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- Banking and Creditors' Rights
- Condo-Community Association Representation
- Corporate and Other Business Transactions
- Defamation, Privacy and First Amendment
- Employee Benefits
- Employment Law
- Estate Planning, Probate and Trust Administration
- Health and Fitness Industry
- Independent Sales Representatives
- Intellectual Property Law
- Litigation and Alternative Dispute Resolution
- Mergers, Acquisitions and Business Sales
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- Real Estate Tax Reduction
- Securities, Futures and Derivatives
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When Is a Noncompete Not Treated Like a Noncompete?

Perhaps when a noncompete is tied to an employee's forfeiture of compensatory benefits!

The year 2024 had no shortage of headlines about contractual noncompete provisions. In April, the Federal Trade Commission announced its final rule to ban noncompetes nationwide. That rule was successfully challenged in court and has been blocked from taking effect. Closer to home, another year passed with Illinois' Freedom to Work act on the books. That law, which took effect on January 1, 2022, bans noncompetes for employees earning less than $75,000 a year and sets a host of other substantive and procedural requirements for noncompetes to be enforceable under Illinois law. Under that statute, a "covenant not to compete" is defined "as an agreement between an employer and an employee . . . that by its terms imposes adverse financial consequences on the former employee if the employee engages in competitive activities after the termination of the employee's employment with the employer." 820 ILCS 90/5.

Seventh Circuit Decision. In LXQ Corporation v. Rutledge, 96 F. 4th 977, decided on March 15, 2024, the United States Seventh Circuit Court of Appeals affirmed the non-enforceability of a noncompete provision under Illinois law. The Freedom to Work Act requires Illinois courts to scrutinize noncompete provisions for "reasonableness." The Seventh Circuit found LXQ's noncompete unreasonable and thus unenforceable for two reasons. First, the noncompete contained a "nine-month restriction barring Rutledge from working for any competitor in any capacity." As stated by the Seventh Circuit: "Illinois law disfavors blanket bars on all activities for competitors." In other words, if a noncompete bars a salesperson from working even as a janitor for a competitor, that provision is likely unenforceable. The second basis for unenforceability was that the noncompete's 75-mile radius was unreasonable. Such a large noncompete area might be justified "by evidence that the entire area aligns with the employer's competitive market," but that's not what was going on here. LXQ alleged that Rutledge was breaching his noncompete by working out of his home. On these facts, the court had "little trouble" invalidating the noncompete provision.

But that was not the end of the inquiry. Ex-employee Rutledge not only signed a noncompete, he also signed additional agreements by which he was granted equity in LXQ. Unlike his noncompete, these agreements were governed by Delaware law. These stock grants were conditioned on Rutledge not competing with LXQ following his separation. LXQ alleged that when Rutledge left, he went to work for a competitor. Thus, LXQ sued to claw back eight years' worth of stock award proceeds valued at hundreds of thousands of dollars – a multiple of his annual salary. The Seventh Circuit was faced with an open legal question: pursuant to Delaware law: should it review these "forfeiture-for-competition" provisions under the stricter reasonableness standard applied to noncompetes, or under the far more relaxed standard that applies to other contract provisions?

Delaware Supreme Court Decision. The Seventh Circuit referred this legal question to the Delaware Supreme Court. On December 18, 2024, the Delaware Supreme Court held that forfeiture-for-competition provisions are not to be evaluated under the reasonableness standard that applies to noncompetes, but under the freedom of contract standard that governs all other contractual provisions. The court concluded that Delaware law "upholds the freedom of contract and enforces as a matter of fundamental public policy the voluntary agreements of sophisticated parties." It wrote that a forfeiture-for-competition provision "stands on different footing than underlies non-competition covenants because it does not restrict competition or a former employee's ability to work." So long as the employee quits of his own accord, the forfeiture-for-competition provision cannot fairly be considered a restraint of trade. The court concluded that companies who give employees such benefits must be able to reasonably expect that the employees will not leave to compete against it.

The Delaware Supreme Court acknowledged that Rutledge may have to pay back 8 years' worth of stock grants, but held that fact "does not alter our analysis." It noted a prior decision where the employee was ordered to disgorge some $200,000 in stock benefits. That ruling was not, per the Delaware Supreme Court, an imposition of a $200,000 penalty. Nor was it an award of liquidated damages. Rather, it was an order that the employee return a benefit that he had forfeited by choosing to work for a competitor. The same rationale applies to LXQ's claim against Rutledge.

Return to the Seventh Circuit. Following the Delaware Supreme Court's decision, Rutledge's case returned to the Seventh Circuit. On January 22, 2025, that court accepted that Delaware's broad freedom of contract principles apply, and that LXQ can enforce its forfeiture-for-competition provision against Rutledge. The court acknowledged that the ruling "would subject Rutledge to a hardship," but since he agreed to the term and was a significant enough of an employee to earn the stock benefit, he was stuck with the deal. The case was remanded for a determination as to whether he actually breached his contract.

Conclusion. The *LXQ* case shows that not all noncompetes are created equal. This is consistent with Illinois' ban on noncompetes for workers making less than $75,000/year. It is also consistent with longstanding Illinois law that distinguishes between noncompetes that are a part of an employment agreement and noncompetes that are attendant to the sale or merger of a business. Courts will examine all circumstances relating to the restrictive covenant at issue and will not interpret these terms in a vacuum. The affirmation of the enforceability of the forfeiture-for-competition provision in the *LXQ* case can be seen as another flavor of this approach. For businesses that regularly grant equity to their employees, it highlights a potentially effective path towards protecting their competitive interests. For employees, it reinforces the old adage that there is no such thing as a free lunch. Whether Illinois courts adopt the *LXQ* holding as a part of Illinois state law and how they might reconcile it with the Freedom to Work Act, remains to be seen.

For further information, please contact Adam N. Hirsch at 312-256-1104 or by e-mail at adam.hirsch@sfbbg.com.

New Year, New Illinois Laws: What Every Employer Needs to Know

Case Success Story

On November 21, 2024 , the Illinois Supreme Court issued its decision in *Glorioso v. Sun-Times Media Holdings, LLC,* (2024 IL 130137). SFBBG, through its attorneys, Phil Zisook and Bill Klein, represented the Plaintiff in the case, Mauro Glorioso, the former Executive Director and General Counsel of the Illinois Property Tax Appeals Board. Glorioso's Complaint alleged that Defendants' news articles defamed him and depicted him in a false light. Defendants contended that the lawsuit was a SLAPP (strategic lawsuit against public participation) which violated the Illinois Citizen Participation Act. The Illinois Supreme Court rejected Defendants' arguments as the articles did not constitute acts in furtherance of government participation and, therefore, were not protected under the Act.

Welcome Aboard!

The Firm is happy to announce the latest addition to our group of attorneys. Edirin Ibru joined the Firm as an associate in the litigation practice.

Speaking Engagement

On December 19, Dan Beederman gave a "MANAcast" (a webinar) for Manufacturers' Agents National Association for whom he serves as Legal Counsel. His presentation, Agreements From Your Manufacturers' Representatives' Perspective, was to MANA members who are manufacturers that use independent sales reps. He made them aware of the contract terms and issues that are important to their sales representatives.

Published Articles

Adam Glazer's "The Case of the Contract Formed by E-mail" and Christian Manalli's "Avoiding Probate — Why You Need an Estate Plan" were articles published by *The Representor*'s winter edition (an Electronics Representatives Association publication).

Law360 published an article in January written by Adam Hirsch and Adam Maxwell. The title of the article was "Discretionary Compensation Lessons From 7th Circ. Ruling."

2025 Super Lawyers

Congratulations to our 2025 Super Lawyers and Rising Stars*: Joan Berg, Pat Deady, Norm Finkel, Adam Glazer, Jeff Heftman, Mike Kim, Adam Maxwell, Jason Newton*, Monica Shamass* and Phil Zisook.

As Illinois businesses settle into 2025, several new laws will significantly impact the employment landscape and business operations. From new pay transparency requirements in recruiting, to increased penalties for alleged discriminatory practices, employers must stay informed to avoid legal pitfalls and help foster a positive working environment.

Pay Transparency Requirements.

Starting January 1, 2025, Illinois employers with 15 or more employees must disclose pay and benefit information in job postings. Amendments to the Illinois Equal Pay Act require job postings (including postings through third-party vendors) to include good faith and detailed pay scales and benefits. This includes, without limitation, expected wage and salary ranges, a description of benefits, and additional compensation such as bonuses and stock options. The law applies both to positions within Illinois and outside Illinois if the employee reports to someone within Illinois. Also, employers must notify current employees of promotion opportunities at least 14 business days before posting the role externally.

Amendments to the Illinois Human Rights Act (IHRA).

The IHRA was updated on January 1, 2025 to include new anti-discrimination protections for employees and heightened penalties against employers:

Family Responsibilities Discrimination: The IHRA now prohibits discriminating against employees based on their family responsibilities, defined as an employee's "personal care" to a family member. "Personal care" is defined as ensuring the family member's basic medical, hygiene and related needs are met. It also includes an employee being physically present to provide emotional support to a family member with a serious health condition who is receiving inpatient or home care. Employers cannot adversely act against employees for fulfilling such caregiving, including for children, elderly parents, or others with health needs.

Reproductive Health Decision Protections: The IHRA also now protects employees for reproductive health decisions, meaning employers cannot discriminate based on an employee's choice to use or access reproductive health services, including contraception, fertility treatments, or family planning.

Increased Penalties: The IHRA increased the monetary penalties against employers for violations. For example, the maximum first-time violation penalty is now $50,000 (previously $10,000). Additionally, the IHRA now allows a court to order employers to pay increased penalties if the employer engaged in "pattern-or-practice" misconduct, meaning increased penalties if an employer's discrimination affected multiple employees over time.

Pay Stub Retention And Access.

Also beginning January 1, 2025, Illinois employers must comply with new paystub retention and access rules.

Pay Stub Requirements: Employers must provide employees with detailed pay stubs outlining the total hours worked, regular pay, overtime pay, and any deductions.

Access to Pay Stubs: Employers must retain pay stubs for at least three years and allow employees to access their pay stubs upon request.

Access for Former Employees: Upon separation for any reason, employers must provide former employees with their pay stubs from up to three years prior to the separation date.

Penalties for Non-Compliance: Employers who fail to provide pay stubs could face civil penalties of $500 per violation.

Personnel Records.

Starting January 1, 2025, amendments to the Illinois Personnel Record Review Act went into effect, enhancing employees' rights to access their personnel records.

Access to Personnel Records: Employers must accommodate at least two requests per employee each calendar year. The employee's request can be made to any person responsible for maintaining the employer's personnel records, e.g. anyone in the human resources department or any other designated person(s).

Written Request Requirements: The employees may request their records formally via letter or email, or informally by simply sending a text message.

Employer Response Obligations: Employers must provide the requested records within seven working days, which can be extended once for an addition seven days if the employer notifies the employee ahead of time.

Designated Representative Access: Employees may designate a representative to inspect their records, e.g. a lawyer.

Cost Limitations: Employers may charge a fee to the employee; however, the fee is limited to covering the actual cost of duplicating the records.

Whistleblowing.

The Illinois Whistleblower Act (IWA) prohibits employers from retaliating against employees who report unlawful activities to administrative agencies, such the Equal Employment Opportunity Commission or the Illinois Department of Human Rights. Starting January 1, 2025, IWA protections expanded to include employees who disclose or threaten to disclose employer misconduct to outside organizations with contractual relationships with their employer. Additionally, the protection now extends to employees who report activities they reasonably believe pose a substantial and specific danger to employee or public health or safety. Employers are prohibited from any adverse actions that could dissuade a reasonable worker from reporting misconduct such as, without limitation, termination, suspension, demotion, pay reduction, or other adverse acts.

Looking Ahead.

These updates present challenges for businesses, but also offer opportunities to build stronger workplace environments and minimize legal risks. To stay ahead, businesses should take the following steps:

Audit Current Policies: Conduct a thorough review of existing HR policies, job postings, and employment practices to ensure compliance with the new laws.

Train Employees: Provide comprehensive training for HR staff and managers on new legal requirements.

Engage Legal Counsel: Consult with legal experts to navigate complex changes.

If you have questions regarding your company's compliance for any of the foregoing, please contact Dean Kalant (dean.kalant@sfbbg.com), or call him at (312) 648-2300.