# Non-Compete Agreements For Low Wage Employees Barred by Illinois' "Freedom to Work Act"

## Labor & Employment Law Update

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Recently the Illinois Attorney General filed a lawsuit against a well-known restaurant franchise seeking to enjoin it from enforcing non-compete provisions in employment agreements that it had required all employees to sign, including hourly employees such as delivery drivers. The clauses at issue prohibited employees from working at any other similar business within two miles of any of the franchisor or its franchisees' stores in the United States. Even though the franchisor agreed to voluntarily drop these clauses moving forward, the Illinois legislature took action and the Illinois Freedom to Work Act (the Act) was signed into law.

Effective January 1, 2017, the Act will prohibit private employers from having "low wage" employees sign an agreement that includes a covenant not-to-compete. Additionally, any covenant not-to-compete entered into between a "low wage" employee and an employer will be considered illegal and void under the Act.

The Act's prohibition will apply to any employee who earns less than $13.00 per hour or the minimum wage required by applicable federal, state or local minimum wage law. Employers can use $13.00 as the current high water mark for who is a low wage employee, as currently, the minimum wage under federal law is $7.25, $8.25 in Illinois and $10.25 in Chicago. However, it is important to remember that if the applicable federal, state or local minimum wage is higher than $13.00 than the individual will be considered a low wage employee under the Act.

The Act defines a covenant not-to-compete as any agreement between the employee and employer that restrict the employee from:

- performing ANY work for another employer for a specified period of time;
- working in a specified geographic area; OR
- working for any other employer that is similar to the employee's work for the employer.

While the Act only applies to agreements entered into after January 1, 2017, it is anticipated that any employer seeking to enforce this type of non-compete restriction against a low wage employee will likely be subject to the same scrutiny and battle as the franchisor who was investigated by the Illinois Attorney General.

It is important to recognize that the Act does not impact employers' ability to include non-disclosure and confidentiality provisions within agreements with low wage employees to protect confidential and proprietary information. Additionally, the Act does not address agreements to not solicit an employer's clients/customers or employees. While a non-solicitation clause could arguably fall within the type of non-compete agreement prohibited by the Act, there are strong arguments that depending on the position and circumstances, a well drafted and limited non-solicitation of clients/customers or employees agreement is different and would be enforceable.

As a practical matter, the impact of the Act will probably be minor. Most restrictive covenant litigation does not involve low wage employees. In addition, low wage employees rarely have the level of customer goodwill that is required to support the enforcement of a non-compete agreement. Nevertheless, employers who use restrictive covenants with low wage employees should take note.

Check this blog for future developments on this Act and other issues related to restrictive covenants and unfair competition.