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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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What You Should Know About Illinois' New Non-Compete Law

Governor Pritzker recently signed into law amendments to the Illinois Freedom to Work Act (the "Act"), with the potential to impact all restrictive covenant agreements entered into on or after January 1, 2022. Companies with operations and employees in Illinois need to evaluate their current restrictive covenant agreements and practices to ensure compliance with the new requirements, some of which are discussed in this article.

The Act bans the use of covenants not to compete for employees with annualized or expected earnings of $75,000 or less, subject to $5,000 upward adjustments every five years until 2037. It also bans the use of covenants not to solicit for workers whose annualized or expected earnings are $45,000 or less, subject to $2,500 upward adjustments every five years until 2037.

A "covenant not to compete" is defined in the Act as:

> an agreement between an employer and an employee … that restricts the employee from performing: (1) any work for another employer for a specific period of time; (2) any work in a specified geographical area; or (3) work for another employer that is similar to employee's work for the employer included as a party to the agreement.

Also included in the definition is:

> 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.

Presumably this definition includes restrictive covenants used as a condition of severance pay.

The Act defines a "covenant not to solicit" as:

> an agreement between an employer and employee that "(1) restricts the employee for soliciting from employment the employer's employees or (2) restricts the employee from soliciting, for the purpose of selling products or services of any kind to, or from interfering with the employer's relationships with, the employer's clients, prospective clients, vendors, prospective vendors, suppliers, prospective suppliers, or other business relationships.

The new law bans the use of non-competes, regardless of income level, with individuals covered by collective bargaining agreements under the Illinois Public Labor Relations Act or the Illinois Educational Labor Relations Act, subject to an exception for certain construction employees. The legislation also bars companies from entering into restrictive covenants with employees who were terminated, furloughed or laid off as a result of the COVID-19 pandemic.

The Act does **not** bar the use of restrictive covenants with the owners and buyers/sellers of a business in connection with acquisitions. It also does not bar employers from enforcing confidentiality restrictions and obligations with respect to inventions and other work product. Employees will continue to be bound by statutory limitations on the use or disclosure of trade secrets. Further, the statute excludes from the definition of "covenant not to compete" contract provisions "requiring advance notice of termination of employment, during which notice period the employee remains employed by the employer and receives compensation."

Under the Act, a restrictive covenant that is not specifically banned under the legislation will nonetheless be considered unenforceable unless "(1) the employee receives adequate consideration, (2) the covenant is ancillary to a valid employment relationship, (3) the covenant is no greater than required for the protection of a legitimate business interest of an employer, (4) the covenant does not impose undue hardship on the employee, **and** (5) the covenant is not injurious to the public." The law defines "adequate consideration" as:

> the employee worked for the employer for at least 2 years after the employee signed an agreement containing a covenant not to compete or a covenant not to solicit or (2) the employer otherwise provided consideration adequate to support an agreement to not compete or to not solicit, which consideration can consist of a period of employment plus additional professional or financial benefits or merely professional or financial benefits adequate by themselves.

In determining the "legitimate business interest" of an employer, "the totality of the facts and circumstances of the individual case should be considered" under the Act:

> Factors that may be considered in this analysis 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, and the scope of the activity restrictions.…

The Illinois law requires that companies provide employees with a copy of the non-compete or non-solicit agreement in advance of starting a new role, and that companies advise employees "in writing to consult with an attorney before entering into the covenant." The Act also provides that if an employee prevails on a claim to enforce a covenant, the employee "shall" recover from the employer all costs and reasonable attorney's fees in connection with such claim.

Companies with operations or employees in Illinois should evaluate their current restrictive covenant agreements and practices, as well as their compensation packages, prior to January 1, 2022. Companies can take advantage of the few employer-friendly aspects of the legislation, and consider other strategies that remain effective at curbing unlawful competition and protecting confidential and trade secret information.

For more information, please contact Norm Finkel at (312) 648-2300 or Norm.Finkel@sfbbg.com.

Neutral Employee Reference vs. Telling it Like it is: Both Sides of the Coin

Case Success Story

After a two-week, in person, jury trial in the Federal District Court in Chattanooga Tennessee, on July 22, SFBBG's Daniel Beederman and Matthew Tyrrell successfully obtained a jury verdict of approximately $750,000.00 on behalf of a Georgia-based independent sales representative against a footwear manufacturer based in Tennessee that it formerly represented.

In the lawsuit, SFBBG asserted that the manufacturer had breached the parties' sales representative agreement by (i) failing to pay all commissions due and owing, (ii) improperly deducting amounts from earned commissions, (iii) terminating the parties' contract in an effort to avoid paying commissions in violation of the implied covenant of good faith and fair dealing, (iv) failing to pay commissions on sales from orders placed prior to the effective date of termination that were fulfilled thereafter, and (v) refusing to pay commission on post-termination sales procured by SFBBG's client's pre-termination efforts, including commissions on millions of dollars of sales of products to a supplier in connection with a 5 year contract with the United States government. Beederman and Tyrrell also convinced the jury to find that the manufacturer had violated the California Independent Wholesale Sales Representatives Contractual Relations Act of 1990 by willfully refusing to pay commissions pursuant to the parties' written contract. As a result, the jury awarded SFBBG's client statutory damages (equal to three times the amount of commissions due), enabling it to petition the court for an award of attorney's fees and costs in accordance with the California statute, plus pre-judgment interest in an amount to be determined.

Welcome New Attorneys

Everyone at SFBBG is happy to announce that new attorneys, Tim Craig and Pat Deady, recently joined our Firm. Tim was formerly with The Northern Trust and joins us as an Associate in the Estate Planning/ Tax practice area.

Pat Deady joins the Firm as an Of Counsel attorney with the Litigation team. Pat comes to us from Hogan Marren Babbo & Rose.

Recognized Achievements

Mark Flessner was selected to become a Fellow by the Litigation Counsel of America (LCA). Fellows are selected based upon excellence and accomplishment in litigation, and superior ethical reputation.

Andrew Johnson and Adam Maxwell were added to our list of Emerging Attorneys, recognized in the practice areas of commercial litigation and civil defense, respectively. Emerging Attorneys are identified by their peers to be the top lawyers in Illinois who are either under the age of 40 or admitted to the practice of law less than 10 years.

When an employer receives a reference request for a former employee, the response is often "Our Company policy is to provide only a neutral reference through verification of employment dates and positions held only." The neutral reference has been recommended for years as a strategy to reduce the risk of lawsuits alleging defamation and/or tortious interference with prospective economic advantage that could follow a negative reference. But a neutral reference is not a guarantee against lawsuits. For example, if a company has an express policy of neutral references only but provides glowing references for *some* employees and neutral references for others, that disparate conduct itself can give rise to a lawsuit.

There is another alternative: the truthful employment reference. Illinois law protects employers from lawsuits for the disclosure of truthful employment information and information *believed to be true* about a job applicant. The Employment Record Disclosure Act, 745 ILCS 46/1 *et seq*. (the "Act") provides:

> Sec. 10. No liability for providing truthful information. Any employer or authorized employee or agent acting on behalf of an employer who, upon inquiry by a prospective employer, provides truthful written or verbal information, or information that it believes in good faith is truthful, about a current or former employee's job performance is presumed to be acting in good faith and is immune from civil liability for the disclosure and the consequences of the disclosure.

745 ILCS 46/10. The Act also provides: "The presumption of good faith … may be rebutted by a preponderance of evidence that the information disclosed was knowingly false or in violation of a civil right of the employee or former employee." *Id*. Thus, if an employee can prove that the review was knowingly false or discriminatory, the employer can be liable. But if the review states that the employee had excessive unexcused absences and the employer can back up its statement with attendance records and show that the policy was evenly applied, it should prevail. The Act generally protects employers that provide excellent reviews for employees who performed optimally and marginal reviews for marginally performing employees, provided that the employer can prove what it said.

The fear of potential exposure largely arises because a *false* statement that an employee lacks qualifications or integrity in his or her occupation or profession constitutes a category of defamation *per se*, where damages may be awarded without proof of economic loss. *Tirio v. Dalton*, 2019 IL App (2d) 181019 (allegedly false statements that county recorder of deeds had a secret "slush fund" he used for "taxpayer-funded vacations" imputed plaintiff's lack of integrity and prejudiced him in his profession); *Dent v. Constellation NewEnergy, Inc*., 2020 IL App (1st) 191652, ¶¶46-47, *leave to appeal granted*, 2021 ILL. LEXIS 312 (March 24, 2021) (allegedly false statements that plaintiff verbally and sexually harassed company's employee and that plaintiff was drunk and disorderly at a company event imputed plaintiff's inability to perform his employment duties or a lack of integrity in his occupation). However, as in any defamation case, truth is a total defense, and an employer may also demonstrate that its statement constitutes a non-actionable opinion or is reasonably capable of an innocent construction, both of which defeat a lawsuit.

Employers are also protected in providing employment references through a qualified privilege. Statements are qualifiedly privileged if they are made in situations: (i) where an interest of the person disseminating the statement is involved; (ii) where an interest of the recipient of the statement is involved; or (iii) where a recognized public interest is involved. *Kuwik v. Starmark Star Marketing Administration, Inc*., 156 Ill.2d 16, 29 (1993). The privilege applies in the context of an employment reference. *Quinn v. Jewel Food Stores*, 276 Ill. App.l3d 861, 871-72 (1st Dist. 1995) (statements to franchisor that plaintiff applicant was "cocky," a "con-artist," and to "watch out for the bullshit," notwithstanding an overall rating of "good," were protected by a qualified privilege). Accord, *Delloma v. Consolidation Coal Co*., 996 F.2d 168, 172 (7th Cir. 1993) (an employer has a conditional privilege to respond to direct inquiries from prospective employers); *Kuester v. PepsiCo, Inc.*, 2019 IL App (3d) 180247-U at §§5, 35 (false statements that distributor's agent stole a check from client's customer, resulting in the agent's termination, were protected by qualified privilege).

The privilege can be lost if the plaintiff shows that the information was disseminated with a direct intent to injure or with a reckless disregard of his rights and the consequences that might result to him or her. *Kuwik* at 30. A reckless disregard of rights includes the failure to properly investigate the truth before speaking, limit the scope of the information disseminated, or disseminate the information only to proper parties. *Id*. Courts usually hold that the abuse of the privilege is a jury question, though there are cases, including *Kuwik*, where dismissal is ordered at the pleadings stage.

The pervasive neutral reference remains the most economically efficient means for employers to respond to reference requests with minimum risk and expense. However, employers should be aware that if they do decide to give detailed employment references, whether positive or negative, the law protects their right to speak truthfully and candidly.

Phil Zisook is of Counsel at Schoenberg Finkel Beederman Bell Glazer LLC where he concentrates in defamation law and commercial litigation.