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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*).

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### 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

Illinois does not have a general statute or regulation governing **non-compete** ([www.practicallaw.com/3-382-3649](http://www.practicallaw.com/3-382-3649)) agreements.

## Industry- or Profession-specific Statute or Regulation

### Lawyers, Illinois Rule of Professional Conduct 5.6

Illinois Rule of Professional Conduct (IRPC) 5.6 governs non-compete agreements for lawyers.

### Broadcasters, 820 Ill. Comp. Stat. 17/10(a)

Section 10 of the Illinois Broadcast Industry Free Market Act governs non-compete agreements for broadcasting industry employees.

### Government Contractors, 30 Ill. Comp. Stat. 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.

**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

Illinois does not have a general statute or regulation governing *non-compete* ([www.practicallaw.com/3-382-3649](http://www.practicallaw.com/3-382-3649)) agreements.

## 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.

(*Brown & Brown, Inc. v. Mudron*, 887 N.E.2d 437 (Ill. App. Ct. 2008).)

## Industry- or Profession-specific Statute or Regulation

### Lawyers, IRPC 5.6

A lawyer cannot offer or make:

- ❑ A partnership or employment agreement that restricts lawyers from practicing law after ending the relationship, except for an agreement about retirement benefits.
- ❑ A settlement agreement that restricts lawyers from practicing law.

(*IRPC 5.6; Dowd & Dowd, Ltd. v. Gleason*, 693 N.E.2d 358 (Ill. 1998).)

**Broadcasters, 820 Ill. Comp. Stat. 17/10(a)**

A broadcasting industry employment contract may not contain a post-employment non-compete provision (820 Ill. Comp. Stat. 17/10(a) (2011)).

A non-compete provision will be enforced if:

- ❑ The provision only covers the contract term.
- ❑ The employee breached the employment contract.

(820 Ill. Comp. Stat. 17/10(b) (2011).)

**Government Contractors, 30 Ill. Comp. Stat. 500/50-25**

An Illinois employer will be charged with 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 Ill. Comp. Stat. 500/50-25 (2011).)

Therefore, a non-compete provision is void if it prohibits parties from bidding on state government contracts (*Health Prof'l, Ltd. v. Johnson*, 791 N.E.2d 1179 (Ill. App. Ct. 2003)).

**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.**

Illinois courts generally disfavor non-competes as a restraint of trade. However, non-compete agreements will be enforced in Illinois if they are reasonable and supported by consideration (*Reliable Fire Equipment Company v. Arredondo, et al*, Case No. 111871, 2011 WL 6000743 at \* 3 (Ill. Dec. 1, 2011)).

A non-compete will be deemed to be reasonable if it:

- ❑ Is ancillary to a valid employment relationship.
- ❑ Is no greater than is 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 Equipment, Company v. Arredondo, et al*, Case No. 111871, 2011 WL 6000743 at \* 3 and fn. 2 (Ill. Dec. 1, 2011).)

Whether an employer has a legitimate business interest worthy of protection depends on the totality of the circumstances; each case is evaluated on its own particular facts. Among the factors to be considered in this analysis are the following:

- ❑ Whether the employer's customer relationships are near permanent.
- ❑ Whether the employee acquired confidential information while working for the employer.
- ❑ Whether the type of activity restriction, its duration, and its geographic scope are appropriately tailored to the employer's interest.

(*Reliable Fire Equipment Company v. Arredondo, et al*, Case No. 111871, 2011 WL 6000743 at \* 3, 10 (Ill. Dec. 1, 2011).)

#### **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*, 392 N.E.2d 1148 (Ill. App. Ct. 1979)).

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

Non-competes are enforceable if the employer terminated employment in good faith and with good cause (*Rao v. Rao*, 718 F.2d 219 (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** ([www.practicallaw.com/4-502-1062](http://www.practicallaw.com/4-502-1062)) a non-compete agreement and enforce it as modified.

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 have expressly authorized modifications (*Eichmann v. Nat'l Hosp. & Health Care Servs., Inc.*, 719 N.E.2d 1141 (Ill. App. Ct. 1999)).

## **Choice of Law Provisions**

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

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

- ❑ The provision violates the public policy of a state with a materially greater interest in the dispute.
- ❑ The parties and contract do not have a substantial relationship with the chosen state.

(*Integrated Genomics, Inc. v. Kyrpides*, 2010 U.S. Dist. LEXIS 67370, 2010 WL 2697604 (N.D. Ill. Jan. 26, 2010); *Int'l Surplus Lines Ins. Co. v. Pioneer Life Ins. Co.*, 568 N.E.2d 9 (Ill. App. Ct. 1990).)

## Reasonableness of Restrictions

### 8. What constitutes sufficient consideration in your jurisdiction to support a non-compete agreement?

Under Illinois law, an act or promise is sufficient consideration if it either:

- ❑ Benefits one party.
- ❑ Hurts one party.

(*Bires v. WalTom, LLC*, 662 F. Supp. 2d 1019 (N.D. Ill. 2009).)

Continued employment for a substantial period of time is sufficient consideration for a non-compete agreement. A substantial period is generally two years (*Brown & Brown, Inc. v. Mudron*, 887 N.E.2d 437 (Ill. App. Ct. 2008)). For example:

- ❑ In *Bires*, the court held that continued employment for less than one year was insufficient consideration.
- ❑ In *Mudron*, the court held that seven months of continued employment was insufficient.

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

Illinois courts consider several factors to determine if a non-compete provision is reasonable, including:

- ❑ The length of time to get new clients (*Eichmann v. Nat'l Hosp. & Health Care Servs., Inc.*, 719 N.E.2d 1141 (Ill. App. Ct. 1999)).
- ❑ Hardship to the employee.

- The non-compete provision's effect on the public.

(*Lawrence & Allen, Inc. v. Cambridge Human Res. Group, Inc.*, 685 N.E.2d 434 (Ill. App. Ct. 1997).)

There are instances where Illinois courts found non-compete provisions to be reasonable. For example, in:

- *Millard Maintenance Service Co. v. Bernero*, 566 N.E.2d 379 (Ill. App. Ct. 1990), the court held that a two-year non-compete provision for a salesperson was reasonable, because it took the employer a long time to get and maintain clients.
- *Mohanty v. St. John Heart Clinic*, 866 N.E.2d 85 (Ill. 2006), the court held that a five-year non-compete provision against a doctor was reasonable because the clinic took ten years to establish a client base.

There are instances where Illinois courts found non-compete provisions to be unreasonable. For example, in:

- *Arpac Corp. v. Murray*, 589 N.E.2d 640 (Ill. App. Ct. 1992), the court held that a two-year non-compete prohibition was unreasonable and too broad.
- *Unisource Worldwide, Inc. v. Carrara*, 244 F. Supp. 2d 977 (C.D. Ill. 2003), the court held that a non-compete restriction longer than one year was unreasonable because any confidential information a former employee learned is useless after one year.

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

Geographic restraints that are broader than necessary to protect the employer's interests are unenforceable (*Arpac Corp. v. Murray*, 589 N.E.2d 640 (Ill. App. Ct. 1992)).

Illinois courts look to see if the geographic restriction is the same as the area where the employer does business (*Cambridge Eng'g, Inc. v. Mercury Partners 90 BI, Inc.*, 879 N.E.2d 512 (Ill. App. Ct. 2007)).

## **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**

In Illinois, 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.
  
- ❑ Cannot extend to customers that the former employee never:
  - ❑ solicited; or
  - ❑ contacted.

(*Lawrence & Allen, Inc. v. Cambridge Human Res. Group, Inc.*, 685 N.E.2d 434 (Ill. App. Ct. 1997).)

## Anti-raiding Agreements

Under Illinois law, an employer may limit a former employee's ability to recruit former co-workers. This is because employers have an interest in maintaining a stable workforce (*Arpac Corp. v. Murray*, 589 N.E.2d 640 (Ill. App. Ct. 1992)).

### 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?

In Illinois, geographic restrictions are based on the employer's scope of business. Courts have upheld covenants without geographic contingents for employers that did business nationwide to keep a former employee from taking the employer's customers (*Arpac Corp. v. Murray*, 589 N.E.2d 640 (Ill. App. Ct. 1992)).

### 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 a breach of a non-compete covenant by the employee, a court may award the employer:

- ❑ Monetary damages.
  
- ❑ Injunctive relief.
  
- ❑ **Liquidated damages** ([www.practicallaw.com/2-501-9324](http://www.practicallaw.com/2-501-9324)).

- ▣ Attorneys' fees and costs.

(*Prairie Eye Ctr., Ltd. v. Butler*, 768 N.E.2d 414 (Ill. App. Ct. 2002).)

A court awards liquidated damages and attorney's fees only if the non-compete agreement has a clause allowing for them (see *Brown & Brown, Inc. v. Ali*, 592 F. Supp. 2d 1009 (N.D. Ill. 2009)).

Liquidated damages may be awarded 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*, 565 N.E.2d 159 (Ill. App. Ct. 1990)).

For a damages award, the employer must show:

- ▣ That the employer suffered damages.
- ▣ A reasonable basis for damages calculations.

In *Ali*, the court held that an employer may recover lost profits if it is proven with a reasonable degree of certainty. An employer may not recover if the amount lost is unknown.

Illinois courts only award punitive damages for non-compete agreements if there is **tortious interference with a contract** ([www.practicallaw.com/5-382-9829](http://www.practicallaw.com/5-382-9829)). Courts do not award punitive damages for contract breach claims (*Rki, Inc. v. Grimes*, 200 F. Supp. 2d 916 (N.D. Ill. 2002)).

### 15. What must an employer show when seeking a preliminary injunction for purposes of enforcing a non-compete?

Generally, Illinois courts require employers to show:

- ▣ A clearly defined right to be protected.
- ▣ Irreparable injury if there is no injunction.
- ▣ That there is no adequate remedy at law.
- ▣ A likelihood of success on the merits of the case.

(*Mohanty v. St. John Heart Clinic*, 866 N.E.2d 85 (Ill. 2006).)

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 (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

Illinois courts enforce non-solicitation agreements if the terms are reasonable and necessary to protect an employer's legitimate business interest. Courts generally do not enforce provisions that prevent former employees from soliciting customers with whom the employees never had direct or actual contact (*Lawrence & Allen, Inc. v. Cambridge Human Res. Group, Inc.*, 685 N.E.2d 434 (Ill. App. Ct. 1997)).

## Confidentiality and Non-disclosure Provisions

Confidentiality and non-disclosure provisions restrict an employee's ability to disclose certain information during and after employment. Under the Illinois Trade Secrets Act, a non-disclosure provision without time or geographic restrictions is enforceable (765 Ill. Comp. Stat. 1065/8(b)(1) (2011)).

## 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. This is because the parties bargain at arm's length (*Diepholz v. Rutledge*, 659 N.E.2d 989 (Ill. App. Ct. 1995)).

Unlike a non-compete covenant, a covenant related to a sale of business only needs to be reasonable in:

- Duration.
- Geographic area.
- Scope.

(*Loewen Group Int'l, Inc. v. Haberichter*, 912 F. Supp. 388 (N.D. Ill. 1996).)

### 17. Is the doctrine of inevitable disclosure recognized in your jurisdiction?

Illinois courts recognize the doctrine of inevitable disclosure (765 Ill. Comp. Stat. 1065/3(a) (2011)). To prove a trade secret misappropriation claim, an employer must show that the former employee will likely use the employer's trade secrets in her new position (*Pepsico, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995)). This is even if the employee did not take anything containing the confidential information (*Strata Mktg., Inc. v. Murphy*, 740 N.E.2d 1166 (Ill. App. Ct. 2000)).

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## Resource information

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**Products:** PLC US Employee Benefits & Executive Compensation, PLC US Labor & Employment, PLC US Law Department

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