Trade Secrets and Restrictive Covenants


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On October 25, 2017, the Illinois attorney general initiated a lawsuit against the Illinois subsidiary of Check Into Cash, Inc. alleging violations of the state’s Freedom to Work Act, which became effective on January 1, 2017, and the state’s Consumer Fraud and Deceptive Practices Act. Check Into Cash provides payday loan, title loan, check cashing, bill payment, and cash advance services. This lawsuit and similar actions taken by other states’ attorneys general and legislatures demonstrate the increased scrutiny that non-competition provisions have faced in recent months. For the reasons we discuss in greater detail below, employers across the country who use or are considering using non-compete agreements with their employees should take note and consider revisiting the issue with their legal counsel.

The attorney general’s lawsuit, People of the State of Illinois ex rel. Madigan, Attorney General v. Check Into Cash of Illinois, Inc., No. 2017-CH-14224 (Ill. Cir. Ct.), seeks declaratory relief invalidating the non-competition provisions in Check Into Cash’s employment agreements, along with injunctive relief (1) preventing Check Into Cash from enforcing the provision and (2) requiring Check Into Cash to notify employees that the provisions are unenforceable and void. The attorney general alleges that under the Freedom to Work Act, 820 ILCS 90/1 et seq., employers are prohibited from entering into non-competition agreements with employees earning under $13 per hour and that Check Into Cash’s agreements executed after January 1, 2017, violate this prohibition. The attorney general further alleges that all Check Into Cash’s agreements that include non-competition provisions—not just agreements with sub-$13 per hour employees executed after January 1, 2017—violate the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et seq., because they offend public policy, are immoral, unethical, oppressive, or unscrupulous and/or cause substantial injury to consumers.

The attorney general alleges that Check Into Cash’s restrictive covenant, which is effective for one year following termination of employment of any duration, is overly broad, ambiguous, and unreasonably prohibits former Check Into Cash employees from employment in a wide range of positions, not just those with Check Into Cash’s actual competitors. Furthermore, the attorney general alleges that the geographic scope of the provision as defined in the agreement—a 15-mile radius of any Check Into Cash location, regardless of where the employee worked—effectively precludes former employees from subsequently working for any of the allegedly broadly defined competitors, such as commercial banks or credit unions, mortgage lenders, or retail stores with in-house credit offerings, in all Illinois areas with a population of over 50,000. The agreement further includes a provision allowing Check Into Cash to seek injunctive relief without requiring proof of actual harm. The attorney general alleges that these provisions are unnecessary given that the employees are not exposed to any Check Into Cash trade secret information, and because employees are already subject to confidentiality and non-solicitation provisions that the attorney general does not challenge. According to the attorney general, Check Into Cash has in fact availed itself of the non-competition provision by advising new or prospective employers of current or former Check Into Cash employees of the agreement.

This is not the first time the Illinois attorney general has challenged a mandatory non-competition provision in an employment agreement. In July of 2016, the Illinois attorney general took similar action against the corporate entities that operate Jimmy John’s sandwich shops. Ultimately, the Jimmy John’s entities entered into a settlement with the state, which included an agreement to pay $100,000 to the attorney general’s office for employee education and outreach programs and to remove the restrictive covenant from their agreements.
Employers requiring non-competition agreements should not, however, assume that they are insulated from similar actions simply because they do not employ workers paid below $13 per hour or because they require such agreements only from higher-paid employees. Although the Freedom to Work Act is applicable only to employees paid below $13 per hour, actions such as those against Check Into Cash and Jimmy John’s implicate broader public policy questions regarding non-competition agreements for a wide range of employees. These actions confirm that the attorney general is scrutinizing restrictive covenants, whether or not they are within the scope of the Freedom to Work Act.

And, significantly, this government intervention in challenging the enforceability of non-competes is not limited to Illinois. As we discussed earlier this year, other states, including Connecticut, New York and Utah, have taken action against non-competition agreements in general, not just those required of lower-wage employees. New York’s attorney general, for example, challenged the restrictive covenants in legal news provider Law360’s employment agreements, in addition to challenging the Jimmy John’s restrictive covenants. And recent Connecticut legislation places limits on the use of non-competition agreements with physicians. Employers, therefore, should reconsider any general practice of requiring employees to enter into broad non-competition agreements and instead should work with legal counsel to carefully assess whether non-competition agreements are needed in particular situations, such as those involving key personnel with access to sensitive information, and tailor them appropriately.

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