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Bench & Bar

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Illinois Supreme Court Lifts Its Pause Order Regarding Judicial Redistricting

BY EDWARD CASMERE

In a summer move that caught many off guard, Illinois legislators passed Public Act 102-0011 changing the boundaries of the Illinois appellate court districts for the first time in over 55 years. The redrawn judicial district map was proposed by lawmakers on May 25th and swiftly signed into law by Governor J.B. Pritzker on June 4. The Illinois Supreme Court took immediate action with a June 7, 2021 order pausing the enactment of the redistricting to give courts adequate time to implement the changes. On December 8th, the Illinois Supreme Court issued a new order lifting the temporary pause effective New Year's Day 2022.

Prior to June 3, 2021, Illinois had five appellate districts made up of Cook County, plus four additional districts

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Amendment to the Illinois Freedom to Work Act Imposes Significant Restrictions on Non-Competition and Non-Solicitation Agreements

BY SARAH E. FINCH & NICK KAHLON

On January 1, 2022, a new amendment to the Illinois Freedom to Work Act went into effect that significantly alters the restrictive covenant landscape in Illinois.

The Act previously prohibited employers from entering into non-competes with "low-wage employees" making less than $13 per hour. The amendment eliminates that language, and now prohibits employers from entering into non-competition agreements with employees making less than $75,000 per year, and from entering into non-solicitation agreements with employees making less than $45,000 per year, with these thresholds rising every 5 years in 2027, 2032 and 2037. 820 ILCS 90/10(a), (b). Since the average salary in

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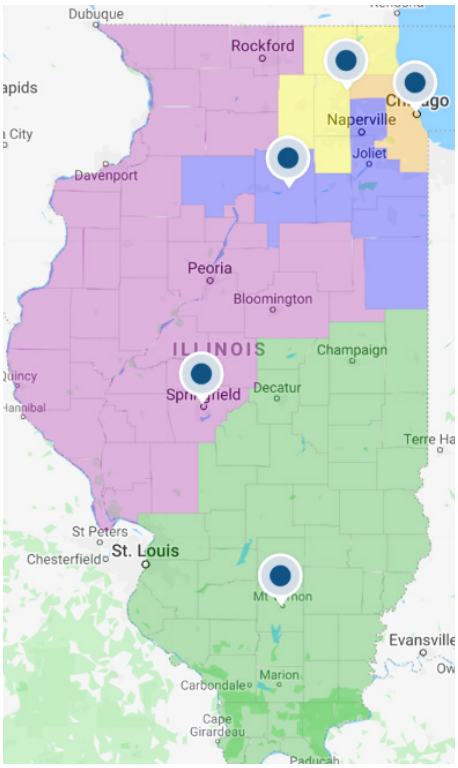
grouped geographically spanning the width of the state stacked north to south. Effective January 1, 2022, the state will still have five appellate districts albeit with a different configuration:

- The **First District** Appellate Court in Chicago will hear cases appealed from trial courts in Cook County.
- The **Second District** Appellate Court located in Elgin will hear cases appealed from trial courts in five counties (DeKalb, Kane, Kendall, Lake and McHenry).
- The **Third District** Appellate Court is in Ottawa and will hear cases appealed from trial courts in seven counties (Bureau, DuPage, Grundy, Iroquois, Kankakee, LaSalle and Will).
- The **Fourth District** Appellate Court in Springfield will hear cases appealed from trial courts in 41 counties (Adams, Boone, Brown, Calhoun, Carroll, Cass, Ford, Fulton, Greene, Hancock, Henderson, Henry, Jersey, Jo Daviess, Knox, Lee, Livingston, Logan, Macoupin, Marshall, Mason, McDonough, McLean, Menard, Mercer, Morgan, Ogle, Peoria, Pike, Putnam, Rock Island, Sangamon, Schuyler, Scott, Stark, Stephenson, Tazewell, Warren, Whiteside, Winnebago and Woodford).
- The **Fifth District** Appellate Court is located in Mt. Vernon and will hear cases appealed from trial courts in 48 counties (Alexander, Bond, Champaign, Christian, Clark, Clay, Clinton, Coles, Crawford, Cumberland, DeWitt, Douglas, Edgar, Edwards, Effingham, Fayette, Franklin, Gallatin, Hamilton, Hardin, Jackson, Jasper, Jefferson, Johnson, Lawrence, Macon, Madison, Marion, Massac, Monroe, Montgomery, Moultrie, Perry, Piatt, Pope, Pulaski, Randolph, Richland, Saline, Shelby, St. Clair, Union, Vermillion, Wabash, Washington, Wayne, White, and Williamson).



See map online at: https://www.illinoiscourts.gov/courts/appellate-court/appellate-court-districts-and-resources/.

The court's June 7, 2021 order was issued pursuant to the court's general administrative and supervisory authority over the courts of Illinois conferred on this court pursuant to Article VI, section 16 of the Illinois Constitution of 1970 (Ill. Const. 1970, art. VI, sec. 16), as acknowledged by the Illinois General Assembly in Public Act 102-0011. The order paused the implementation of the new districts "in view of the numerous changes to the processing of appeals and the administration of the justice system in Illinois necessitated by Public Act 102-0011, including but not limited to, updates to e-filing and case management systems software, redistribution of staffing and judicial resources, and training of judicial stakeholders and education of

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the public and members of the bar; to give sufficient time to plan and implement such changes required by Public Act 102-0011, and to facilitate an orderly transition, avoid errors and guarantee access to justice; and recognizing that Public Act 102-0011 states that nothing in the Act is 'intended to alter or impair the ability of the Supreme Court to fulfill its obligations to ensure the proper administration of the Judicial Branch.'" *See* June 7, 2021 Order *In re: 2021 Judicial Redistricting* M.R. 30858.

The court's December 8, 2021 order not only set the effective date for the re-districting to take effect (January 1, 2022), but also answers some of the practical, procedural, and legal questions raised by the reshuffling of jurisdictions:

1. Effective January 1, 2022, the court's order of June 7, 2021, pausing the implementation of redistricting pursuant to Public Act 102-0011 is hereby vacated. On or after the effective date of this order, a notice of appeal initiating an appeal to the appellate court or a direct appeal to the supreme court pursuant to Rule 302(b) shall be transmitted by the clerk of the circuit court to the appropriate appellate district as established by Public Act 102-0011. Likewise, on or after the effective date of this order, a petition or application or motion under Rule 303(d), Rule 303A, Rule 306, Rule 307(d), Rule 308, Rule 335, Rule 604(c), or Rule 606(c) shall be filed in the appropriate appellate district as established by Public Act 102-0011. These provisions shall apply regardless of the date of the judgment appealed or sought to be appealed.
2. Circuit courts remain subject to the rule that, when conflicts arise among the districts, the circuit court is bound by the decisions of the appellate court of the district in which it sits. *Aleckson v. Village of Round Lake Park*, 176 Ill. 2d 82, 92 (1997). For purposes of application of this rule in a redistricted circuit, the appropriate appellate district shall be the district in which the circuit was located at the time that the circuit court action was initiated.
3. If a case is heard by one appellate district on appeal and if a subsequent appeal in that case is heard by a new appellate district pursuant to this order, the new district shall treat the decision of the prior district as the law of the case. The fact that the decision of the prior district applied the law of the prior district that is contrary to the law of the new district shall not be a basis for departing from the decision of the prior district.

See December 8, 2021 Order *In re: 2021 Judicial Redistricting* M.R. 30858.

The new configuration of the appellate districts in Illinois has wide-ranging implications for Illinois judges, lawyers, and litigants. Actions pending in many different counties are now to be appealed to a different appellate court, but those trial courts are still bound by appellate court decisions from the "prior" district for cases filed on or before December 31, 2022. Appellate courts are also bound to follow the law of the case in subsequent appeals even if the prior decision is contrary to the law of the new district.

For more information visit the www.illinoiscourts.gov website.■

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Amendment to the Illinois Freedom to Work Act Imposes Significant Restrictions on Non-Competition and Non-Solicitation Agreements

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Illinois is less than $75,000, the Act now applies to the majority of Illinois employees.

The amendment imposes two other prohibitions on restrictive covenants. It prohibits employers from entering into non-competition or non-solicitation agreements with employees terminated or furloughed or laid off "as the result of business circumstances or governmental orders related to the COVID-19 pandemic" or similar circumstances, unless the employee is compensated at their base salary during the period of enforcement less their subsequent earnings. *Id.* § 10(c). The amendment further prohibits non-competition agreements with certain public and educational employees (who are covered by collective bargaining agreements under the Illinois Public Labor Relations Act or the Illinois Educational Labor Relations Act) and certain construction workers (who do not work in management, engineering, architecture, design or sales, and are not owners of the business). *Id.* § 10(d).

The amendment also contains provisions regarding employer notice, fee recovery for prevailing employees, and oversight by the Illinois Attorney General. Employers are required to advise employees, in writing, to consult with an attorney before entering into a non-competition or non-solicitation agreement, and they must provide employees with the restrictive covenant at least 14 days before beginning employment or signing it. *Id.* § 20. Employees who prevail in an employer's action to enforce a non-compete or non-solicit agreement are now statutorily entitled to recover their costs and reasonable attorney's fees. *Id.* § 25. The Illinois Attorney General is authorized to investigate and take action against employers who regularly violate the Act. *Id.* § 30.

In addition, the amendment codifies existing Illinois restrictive covenant law in several respects. An agreement not to compete or solicit (1) must be supported by adequate consideration, (2) must be ancillary to a valid employment relationship, (3) can be no greater than required to protect legitimate business interests, (4) cannot impose undue hardship on the employee

and (5) cannot be injurious to the public. *Id.* § 15. Regarding the first element, the amendment codifies the rule in *Fifield v. Premier Dealer Services, Inc.*, 2013 IL App (1st) 120327 that continued employment, by itself, is only adequate consideration for a covenant not to compete or solicit if the employee worked for the employer "for at least 2 years" after signing the agreement containing the covenant. 820 ILCS 90/5. Regarding the third element, the amendment adopts the rule in *Reliable Fire Equipment Co. v. Arredondo*, 965 N.E.2d 393 (Ill. 2011) that whether a covenant protects legitimate business interests is determined by "the totality of the facts and circumstances" of each case. 820 ILCS 90/7. The amendment recognizes that courts may reform (i.e., blue pencil) overbroad covenants, *id.* § 35(b), but cautions that "extensive judicial reformation" may be against public policy and discourages courts from "wholly rewriting" contracts. *Id.* § 35(a).

Finally, the amendment explicitly recognizes two limitations on its application. First, it only applies to agreements "entered into after the effective date" of the amendment (i.e., January 1, 2022) and is not retroactive. *Id.* § 5. Second, it does not apply to other types of restrictive covenants, such as those regarding confidentiality, non-use or non-disclosure of trade secrets, or assignment of inventions, and it does not apply to covenants made in connection with the sale of a business, garden-leave agreements, or agreements not to reapply to the employer. *Id.*

Employers and employees should be mindful of this new law and ensure that they comply with its requirements when entering into future non-competition and non-solicitation agreements. ■

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New Rules on Judicial Performance Evaluation

BY HON. ALFRED SWANSON (RET.)

With the new year, 2022, comes a new procedure for the Judicial Performance Evaluation program. There is now an exception to the complete confidentiality of the evaluation information obtained pursuant to rule 58 for circuit and associate judges. The Supreme Court's Committee on Judicial Performance Evaluation proposed the change in the rule.

Before January 1, 2022, the rule provided that only the evaluated judge and the individual facilitating the evaluation and presenting the material to the judge would know the contents of the evaluation and the name of the judge being evaluated. The only exception to that strict confidentiality was in the instance of a criminal investigation where a law enforcement agency could make a written request for information about a particular judge. That remains the case for evaluations done after January 1, 2022.

The amended Rule 58 effective January 1, 2022, retains the goal that the "program must be conducted candidly and in strict confidence" and that "the disclosure of evaluation information would be counterproductive to the goals of the evaluation program." The amended rule still provides that all information, notes, computer and other data used in the course of a judicial performance evaluation "shall be privileged and strictly confidential" and that only the judge being evaluated and the person facilitating the evaluation are permitted to know to which judge the particular information applies.

However, the modification to the strict confidentiality for performance evaluations conducted after January 1, 2022, allows a chief judge or the Supreme Court to request performance evaluation data for a judge in accord with Rule 21.[1]

Supreme Court Justice Michael Burke, the liaison to the committee, emphasizes that confidentiality is still intact with this amendment. "It does not open the door" to disclosure of evaluation information on any judge. The purpose of the amendment, according to Justice Burke, is to give chief judges "one more tool in the toolbox to supervise judges and give the chief more information to make a decision." He pointed out that a chief judge will need a specific reason to request the Supreme Court to authorize release of the evaluation information. Justice Burke anticipates the Supreme Court will "look critically" at any request for evaluation information and not give "rubber stamp: approval to any requests." He said that each such request will be reviewed on a case-by-case basis as presented. He does not anticipate the Supreme Court will receive many requests for the evaluation information.

While some states make judicial performance evaluations available to the public, fifth District Justice Barry Vaughan, chair of the performance evaluation committee, told me Illinois does not allow such access. Justice Vaughan expressed confidence that the potential availability of evaluation data to a chief judge will be a tool for self-improvement. Both Justice Burke and Justice Vaughan are facilitators in the evaluation program. From their experiences from numerous evaluations are that the vast majority of Illinois judges receive good evaluations from attorney and court personnel surveyed.

Justice Vaughan gave a possible scenario where the performance evaluation

information might likely be used: A chief judge may have some information from other sources about performance issues with a judge. The chief could use the the authority from Rule 21 to request access to the judge's performance evaluation data. The chief could cite the past positive evaluations to focus with the judge on issues that may be impacting judicial performance and assist the judge in resolving those issues and remaining a productive member of the judiciary. Justice Burke said he expects any use of the performance evaluation data to be rehabilitative and not disciplinary.

Scott Szala, a former member of the committee and strong proponent of the amendment, agrees that the change in Rule 58 is to assist a chief judge in maintaining a strong judiciary in the circuit. Szala also anticipates there will be very few requests from chief judges to receive performance evaluation information on any judges in their circuits. Justice Vaughan said he expects this authority for a chief to request judicial performance evaluation data on a judge will be an extreme measure that will rarely be used. ■

1. The link to the Supreme Court's Order entered December 6, 2021, is: https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/f4040103-d4e6-49b2-af26-8bb8b1c4d896/120621.pdf#:~:text=Amended%20Rule%2058%20allows%20the,or%20who%20persistently%20fail%20to. Note that on December 22, 2021, the Supreme Court entered a subsequent order that corrected a typographical error to show that the amendment takes effect January 1, 2022, instead of January 1, 2021.

Recent Appointments and Retirements

1. Pursuant to its constitutional authority, the supreme court has appointed the following to be circuit judge:

- Tracie Porter, Cook, County Circuit, November 12, 2021
- Hon. Thomas M. Donnelly, Cook County Circuit, December 8, 2021

2. Pursuant to its constitutional authority, the supreme court has reinstated the following judge:

- Hon. John L. Hauptman, Retired Judge Recalled, Appellate Court, 3rd District. December 1, 2021

3. The following judges have retired:

- Hon. Margaret A. Brennan, Cook County Circuit,, November 1, 2021
- Hon. Robert T. Hanson, 15th Circuit, November 30, 2021
- Hon. Vicki Wright, Appellate Court, 3rd District, November 30, 2021
- Hon. Clarence W. Harrison II, Associate Judge, 3rd Circuit, December 10, 2021
- Hon. Ronald G. Matekaitis, 23rd Circuit, December 29, 2021
- Hon. John Thomas Carr, Associate Judge, Cook County Circuit, December 31, 2021
- Hon. W. Charles Grace, 1st Circuit, December 31, 2021
- Hon. Cheryl Delores Ingram, Cook county Circuit, December 31, 2021
- Hon. Paul G. Lawrence, 11th Circuit, December 31, 2021

4. The following judge has resigned:

- Hon. Dianne M. Shelley. Cook County Circuit, December 31, 2021■