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Supreme Court Eases the Burden for Proving Reverse Discrimination Claims

BY RACHEL E. BOSSARD AND CHRISTINE EDUARDO

ON JUNE 5, 2025, THE UNITED States Supreme Court issued a unanimous decision in Marlean A. Ames v. Ohio Department of Youth Services, vacating the Sixth Circuit's decision that a plaintiff claiming anti-heterosexual discrimination in the workplace must meet a higher standard of proof. This holding establishes a significant precedent for all reverse discrimination cases under Title VII. Title VII of the Civil Rights Act of 1964 is a federal law that prohibits employment discrimination based on race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), and national origin. 42 U.S.C. §§ 2000e - 2000e17 (as amended).

After being employed by the Ohio agency for fifteen years, Ames unsuccessfully applied for a new management position, which was awarded to a lesbian woman. Ames was later demoted from her role as program administrator and a gay man was hired to fill that position. The Sixth Circuit granted summary judgment in favor of the employer and found that Ames failed

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Summary of Issues Which Could Affect Your Health and Welfare Plan(s)

BY BERNARD G. PETER

1. Prescription Drug Data Collection (RxDC) rules, which were enacted by Section 204 of Title II of Division BB of the Consolidated Appropriations Act of 2021, require reporting for the 2024 reference year by June 1, 2025. If this report was not made, it should be made as soon as possible.
2. The Patient-Centered Outreach Research Institute (PCORI) filing must be filed by July 31, 2025. The filing and payment of the filing fee is required for policy and plan years that ended during the 2024 calendar year. For plan years ending before October 1, 2024, the fee is $3.22 per

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to make a prima facie showing that the defendant acted with a discriminatory motive because she had not shown "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority."

In a unanimous opinion by Justice Jackson, the Supreme Court held that the Sixth Circuit was wrong to require Ames to prove "background circumstances" or a pattern of prejudice to support her claim that she was denied a promotion and demoted because she was not a member of the LGBTQ+ community and that her employer was biased toward that community. The Supreme Court further stated that Title VII prohibits intentional discrimination against "any individual" because of a protected characteristic, regardless of whether that person is a member of a majority or minority group. A minority group member would not be required to establish such a pattern and, therefore, a member of a majority group should not be required to either.

At issue in the case was the Supreme Court's 1973 decision in *McDonnell Douglas Corp. v. Green*, which outlines the standard by which a plaintiff in a Title VII case must establish intentional discrimination. Essentially, *McDonnell Douglas* only requires that plaintiffs demonstrate that they are members of a protected class and that they were treated less favorably than non-members. They are not required to provide background circumstances or a pattern of conduct. The high Court agreed that the Sixth Circuit's ruling went against *McDonnell Douglas*, by holding Ames to a higher standard.

Disparate treatment under Title VII occurs when an employer intentionally discriminates against an employee or job applicant based on their race, color, religion, sex, or national origin. To prove disparate treatment, an individual must demonstrate that they were treated less favorably than others in similar circumstances solely because of their protected class. An employer cannot take an adverse employment action — such as firing, refusing to hire, demoting, refusing to promote, etc. — against an employee or applicant based on any of these protected characteristics.

The Supreme Court's ruling reaffirms that all Title VII plaintiffs, regardless of group status, must be treated equally under the law. While most Title VII cases arise from minority group plaintiffs, this ruling makes it clear that reverse discrimination cases from majority group plaintiffs are also actionable under Title VII. Accordingly, it is likely that employers will see an uptick of reverse discrimination claims from employees who are majority group members. ■

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BURKE, WARREN, MACKAY & SERRITELLA, P.C.

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covered life. For plan years ending on or after October 1, 2024, and before October 1, 2025, the fee is $3.47 per covered life. The filing is made on IRS Form 720. You should check with your health care provider to determine if your organization must make this filing. The IRS can assess a fine for a late filing.

3. Suits have been filed against companies by employees in situations where the Pharmacy Benefit Manager (PBM) and health care provider are the same, resulting in higher prescription costs for health care plan participants. The employees argue that the PBM may be passing on an excessive amount of its prescription costs to the health care provider, thus increasing the prescription cost to participants. You may have discussed this issue with your health care provider and been assured that their PBM is not doing this. If you have not had this discussion with your health care provider, you may want to consider doing so. Although the number of individuals covered by your Health Care Plan may be small, it only takes one employee or former employee who feels he or she was not treated fairly to bring a lawsuit against your organization, which would be costly to defend.
4. President Trump issued an Executive Order on April 15, 2025 on Prescription Drugs, which requires the following:
   A) That Federal health care programs, intellectual property protections, and safety regulations are optimized to provide access to prescription drugs at a lower cost to American patients and taxpayers.
   B) The Secretary of Health and Human Services, within 90 days of April 15, 2025 (July 14, 2025), is to streamline and improve the statutory program that permits the importation of drugs from Canada to make it easier for states to obtain approval to do so.
   C) The Secretary of Labor is directed to propose regulations pursuant to ERISA Section 408(b)(2)(B) within 180 days (October 12, 2025) of the Executive Order to improve employer health plan fiduciary transparency into the direct and indirect compensation received by PBMs.

   Thus, while the Executive Order has no immediate impact on your Health Care Plan, there could be some impact on the Plan later in 2025 or 2026.
5. On April 21, 2025, the U.S. Supreme Court heard arguments in the *Kennedy v. Braidwood Management, Inc.* case in which Braidwood is challenging the requirement of the Affordable Care Act (ACA) to cover preventative services. If the Supreme Court rules in favor of Braidwood the following ACA services would be unenforceable: screenings for breast, cervical, colorectal, lung and skin cancer; screenings for diabetes, depression and hepatitis, and vision problems in children; screening and treatment for HIV and pre-HIV treatment; and care for those who are pregnant and breastfeeding and care for their young children.
6. The IRS and the U.S. Department of Labor (DOL) have begun to apply similar rules to Health and Welfare Plans as have been applied to retirement plans for many years. If you have not done so, I suggest you consider adding a Health and Welfare Plan Committee to discuss matters that might impact your Health and Welfare Plan(s). You should prepare a summary of your discussions so that if you ever receive an inquiry from the DOL or the IRS, or a Plan participant, you can produce the summary to show you have acted with due diligence in administering your Health and Welfare Plan(s). ■

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Enforceability of Non-Compete Agreements in Illinois

BY ARIANA THAO AND LAWRENCE STARK

I. Issue addressed in this article:

Are employer-employee non-compete agreements in the State of Illinois enforceable? If they are enforceable, are there restrictions to these agreements?

II. Short answer:

Restrictive covenants, specifically, employer-employee non-compete agreements are enforceable in Illinois under the Illinois Freedom to Work Act (IFWA), 820 ILCS 90. However, as to their enforceability, there are certain restrictions to a non-compete agreement as of January 1, 2022. These restrictions include the circumstances they are created under, the terms of the agreement, and how courts will enforce the agreements. As well, the Federal Trade Commission Non-Compete Clause Rule at 16 CFR 910[1] may affect this Act, but its enforcement has been stayed for the foreseeable future due to active litigation across the United States. See *Ryan, LLC. v. FTC*, 24-cv-986, D.I. 11 (N.D. Tex. Aug. 20, 2024).[2]

III. Discussion:

A non-compete agreement is a restrictive covenant between the employer and employee that restricts the employee from performing:

1) any work for another employee for a specified period of time;
2) any work in a specified geographical area; or
3) work for another employer that is similar to the employee's work for the employer included in the agreement. (820 ILCS 90/5)

Non-competes do not include non-solicitation agreements, confidentiality agreements, trade secret agreements, purchasing agreements, or advance notice termination agreements.

Under the Illinois Freedom to Work Act, no employer shall enter into a covenant not to compete with an employee in the following common[3] circumstances:

- unless the employee's actual or expected annualized rate of earnings exceeds $75,000 per year. **Note:** This amount shall increase to $80,000 per year beginning on January 1, 2027, $85,000 per year beginning on January 1, 2032, and $90,000 per year beginning on January 1, 2037. (820 ILCS 90/10(a))
- who an employee terminates or furloughs or lays off as the result of business circumstances or governmental orders related to the COVID-19 pandemic or under circumstances that are similar to the COVID-19 pandemic, unless enforcement of the covenant not to compete includes compensation equivalent to the employee's base salary at the time of termination for the period of enforcement minus compensation earned through subsequent employment during the period of enforcement. (820 ILCS 90/10(c))
- if the employee is covered by a collective bargaining agreement under the Illinois Public Relations Act or the Illinois Educational Labor Relations Act and individuals employed in construction (excluding employees who primarily perform management, engineering or architectural, design, or sales functions for the employer or who are shareholders, partners, or owners in any capacity of the employer. (820 ILCS 90/10(d) and 10(e))

For employers who intend to create a restrictive covenant agreement, a restrictive covenant is illegal and void unless:

- the employer advises the employee in writing to consult with an attorney before entering into the covenant, and
- the employer provides the employee with a copy of the covenant at least 14 calendar days before the beginning of their employment or provides the employee with at least 14 calendar days to review the covenant. **Note:** The employer is in compliance even if the employee voluntarily signs the covenant before the end of this 14-day period. (820 ILCS 90/20)

The non-compete agreement itself is illegal or void unless each item below is satisfied:

1) The employee receives adequate consideration. **Note:** "Adequate consideration" is defined term under the IFWA, and requires either proof that a) the employee worked for the employer for at least 2 years after signing the non-compete agreement, or b) the employer otherwise provided consideration to support the agreement, which consisted of adequate professional or financial benefits, or a period of employment plus additional professional or financial benefits. (820 ILCS 90/5)
2) The covenant is ancillary to a valid employment relationship.
3) The covenant is no greater than is required for the protection of a legitimate business interest of the employer, which is a determination based on the totality of the facts and circumstances on a case-by-case basis.
4) The covenant does not impose undue hardship on the employee.
5) The covenant is not injurious to the public. (820 ILCS 90/15)

At common law, Illinois courts will only enforce a non-compete agreement if it is:

1) supported by adequate consideration.
2) reasonable.

- Key considerations:
  a) Ancillary to a valid contract or employment relationship.

b) No greater than required for the protection of a legitimate business interest of the employer.
c) Does not impose an undue hardship on the employee.
d) Not harmful to the public (*Reliable Fire Equip. Co. v. Arredondo*, 2011 IL 111871, ¶¶16 - 17 (Ill. 2011); *Brown & Brown, Inc. v. Mudron*, 379 Ill. App. 3d 724, 728 (2008).)

3) necessary to protect the legitimate business interest of the employer.

- Relevant factors:
  a) The employer's customer relationships are near permanent.
  b) The employee acquired confidential information while working for the employer.
  c) The type of activity restriction, its duration, and its geographic scope are appropriately tailored to the employer's interest. (*Reliable Fire Equip. Co.*, 2011 IL 111871, ¶16.)

If an employee succeeds in an action enjoining the non-compete agreement, the employee is entitled to recover costs and attorney's fees in addition to any other appropriate relief. If the employer succeeds in a suit for breach of a non-compete covenant, the court may award the employer monetary damages, injunctive relief, liquidated damages, or attorneys' fees and costs. *Prairie Eye Ctr., Ltd. v. Butler,* 329 Ill. App. 3d 293, 303-05 (2002); 820 ILCS 90/25.

Non-competes and the FTC ruling:

As of September 4, 2024, the Federal Trade Commission's rule on non-compete agreements was enjoined, and its enforcement is banned nationwide. However, existing non-compete agreements for senior executives can remain in force, specifically senior executives who earn more than $151,164 annually and who are in policy making positions. Any new non-competition agreements or attempted enforcement after this date is banned even if they pertain to senior executives. The Commission determined that non-compete agreements were an unfair method of competition and in violation of Section 5 of the FTC Act.

Additionally, under this new rule, employers will have to "provide notice to workers bound to an existing noncompete that the noncompete agreement will not be enforced against them in the future." Model language for this notice appears at 16 CFR 910.2(b)(4)(Figure 1) and (b)(6).

This rule currently is under active litigation across the United States; therefore, the state of this rule is not definitive. If this rule is upheld, the Illinois Freedom to Work Act will be affected; however, courts will defer to state rules. Press Release, Federal Trade Commission, *FTC Announces Rule Banning Noncompetes* (April 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes.

IV. Conclusion:

Under the Illinois Freedom to Work Act, non-compete agreements are enforceable. However, non-compete agreements are restricted to certain standards and circumstances to ensure their enforceability. These restrictions include the circumstances they are created under, the terms of the agreement, and how courts will enforce the agreements.

Also, employers will need to continue to monitor the status of the FTC Non-Compete Clause Rule litigation. At present, there is no way to determine how it will affect the Illinois Freedom to Work Act. ■

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1. This rule makes existing non-compete agreements unenforceable after September 4, 2024.
2. On March 7, 2025, the FTC moved to stay its appeal for 120 days and the court granted the request, ordering that the case be stayed until July 12, 2025.
3. Additional circumstances are addressed under 820 ILCS 90/10.