New Development In The Enforceability of Non-Compete Agreements

James Convery
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As many of our readers may recall, the Illinois Appellate Court in the First District dramatically changed (in our view) the law two years ago in its infamous *Fifield* decision, by holding that if employment (or continuing employment) is the consideration for a post-employment non-competition agreement, the individual had to be employed for two years after signing in order for it to be sufficient consideration.

On June 25, 2015, the Court issued a new opinion upholding the two-year consideration "rule" but hinted at what may be other acceptable consideration when hiring an at-will employee.

In *McInnis v OAG Motorcycle Ventures*, the employee quit his job to join a competitor. He had no restrictive covenant at the time he quit. Apparently, the grass was not greener at the new employer. After a single day at the competitor, the employee changed his mind and requested to return to his old job. The employer agreed, but as a term and condition of his employment he now had to sign a restrictive covenant. The employer argued that as "additional consideration" for McInnis, it waived the 90-day trial period for new employees in order to be eligible for certain benefits. The employee then quit again after 18 months. Without much explanation, the trial court determined that the waiver of the 90-day trial period was not adequate consideration and the Appellate Court affirmed, noting (with what appeared to be somewhat tacit approval) the comments of the trial court on the issue of consideration:

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James J. Convery

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There can be other ways for [the employer] to enforce the covenant, even if it's less than two years. And that would be if there is evidence that there was additional consideration, such as an added bonus in exchange for this restrictive covenant, more sick days, some incentives, some kind of “newfangled compensation” that would be considered in the eyes of the law additional consideration that would then support the restrictive covenant as being less than two years.

While the Appellate Court did not say what would constitute adequate consideration, it seemed to be in agreement with the trial court as to what ***might*** constitute adequate consideration.

The *McInnis* ruling likely can be used to argue that the following constitute adequate consideration in exchange for a restrictive covenant in an at-will setting:

- a signing or other bonus
- additional sick days above the norm
- other incentives (you may need to be creative)
- the very precise "newfangled compensation" (whatever that may mean)