Another Federal District Court Declines To Apply Bright Line Two-Year Standard for Restrictive Covenant Consideration

Labor & Employment Law Update

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Readers of this blog know there is an intense debate in the courts over the application of *Fifield v. Premier Dealer Servs., Inc.*, 993 N.E.2d 938, 943 (Ill.App 1st Dist. 2013). *Fifield* announced that restrictive covenants supported solely by an at-will employment relationship were invalid for lack of adequate consideration if the employee did not remain employed for two years after signing the contract. This applies even if the employee voluntarily terminated. The Illinois Supreme Court did not accept review of *Fifield*, so it is controlling law in Illinois. However, it has been controversial. While some courts have applied the two-year standard, many others have held that a more flexible approach is called for.

By opinion dated March 10, 2016, U.S. District Court Judge Robert W. Gettleman, of the Northern District of Illinois, declined to rule that a non-solicitation agreement was invalid because the former employee had not worked for the plaintiff employer for two years.

The case, *R.J. O'brien & Associates, LLC v. Williamson*, 2016 WL 930628, was an action by the plaintiff, a futures brokerage and clearing firm, against a former member of its trading desk operation. The defendant was hired in April 2012. He signed contracts with a one year non-solicitation clause as to customers and employees.

The defendant resigned in April 2013 and joined a competitor, Wells Fargo. He solicited his co-workers to join him before he left, and continued after he left. One of the executives he recruited joined him at Wells Fargo a few months after he started.

The plaintiff sued to enforce the contracts. Notably, it only sought damages and did not seek injunctive relief. The defendant moved for summary judgment based on *Fifield*, arguing that the two year requirement was not met so the covenants failed for lack of consideration. He also argued that there was no evidence that he had solicited plaintiff's employees. The court denied the motion

for summary judgment noting that while some courts have strictly applied *Fifield*'s two year standard, at least three federal courts in Illinois have rejected the bright line approach in favor of a more flexible approach. The court also stated that there was support in the Illinois case law for distinguishing between cases where the employee was terminated and where the employee resigned. Finally, the court stated that the consideration issue was less important where, as in the case at bar, the plaintiff only sought damages and did not seek equitable relief. Based on these factors, the court held that consideration was adequate.

O'brien is part of a trend, at least in the Northern District of Illinois, to reject the bright line interpretation of *Fifield* and instead, employ a fact-specific approach which is more favorable to employers and more supportive of the enforcement of restrictive covenants. We will keep you apprised as further decisions address this topic.

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