The Ongoing Debate About Adequate Consideration in Non-Competition and Other Restrictive Covenants

Labor & Employment Law Update

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In late June, the appellate court for the first district reiterated that employment lasting less than two years is inadequate consideration to support enforcement of a post-employment restrictive covenant. In *McInnis v. OAG Motorcycle Ventures*, a motorcycle salesman filed a lawsuit seeking to have his non-competition agreement declared invalid because he resigned 18 months after signing the agreement. The employer counterclaimed seeking an injunction to enforce the restrictive covenant. The salesman won.

The court came to this conclusion after examining the 2013 first district case, *Fifield v. Premier Dealer Services, Inc*. That case has been criticized because of its emphasis on the duration of employment after the execution of the agreement, as opposed to reviewing the totality of the circumstances under the Illinois Supreme Court standard. The case involved an employee who was laid off when his employer was purchased by another company. The new company offered the employee a job, but required him to sign a non-competition agreement. While he signed the agreement, the employee resigned three months later. The employee and his new employer sued to invalidate the agreement. The court agreed and established a bright-line rule that employment lasting less than two years after signing a non-competition agreement would not be sufficient consideration. Before this decision, courts had maintained that employment for a "substantial" period of time would be sufficient consideration. The employer, supported by the Illinois Chamber of Commerce, appealed the *Fifield* decision to the Illinois Supreme Court. However, the appeal was denied.

The Third District Court also adopted the two-year rule. In the 2014 case of *Prairie Rheumatology Associates, S.C. v. Francis*, the court held that a physician, who left the practice after 19 months, was not bound by her non-competition agreement. Some federal court judges, however, have expressed skepticism that the Illinois Supreme Court would adopt the two-year rule. In February, Judge J.B. McDade of the Central District noted that the two-year rule in *Fifield* is "overprotective of employees, and risks making post-employment restrictive covenants illusory for employers subject completely to the whimsy of the employee as to the length of his employment."

This ongoing debate is by no means settled. In fact, Justice David Ellis disagreed with the majority of the court in the *McInnis* decision. In his dissent, Justice Ellis stated that he does not believe that a *per se* rule exists in Illinois nor that a bright-line, two-year rule is warranted. We will have to wait and see what happens.

Until the issue is settled by the Illinois Supreme Court, employers should review their existing restrictive covenants to ensure that there is sufficient consideration in light of these court decisions and should carefully analyze what consideration is being offered in agreements currently being negotiated. This additional consideration can take the form of added bonuses, additional benefits such as more sick or vacation time, or other incentives particular to the individual business and employees.