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Legal Update

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EMPLOYERS WILL NEED TO "RECONSIDER" NON-COMPETITION AND NON-SOLICITATION AGREEMENTS

By Jon Vegosen

Illinois courts will not enforce employment agreements restricting competition and solicitation of customers following an employee's separation, if the employee received insufficient consideration in exchange for the restrictions. It has long been thought that an employee's signing an employment agreement *prior to or at the outset* of employment provides sufficient consideration to support such restrictions by virtue of the employment itself (along with the employee's compensation and benefits).

A recent decision of the Illinois First District Appellate Court, however, makes "sufficient consideration" much more difficult to establish and is sending shock waves through Illinois employers. Some fear that the decision, if it stands, might even drive employers from the State of Illinois.

In *Fifield v. Premier Dealer Services, Inc.*, the appellate court held that "there must be at least two years or more of continued employment to constitute adequate consideration in support of a restrictive covenant." This principle applies even if an employee signs his or her employment agreement prior to or at the commencement of employment (as opposed to after having begun employment). Moreover, if the employee voluntarily resigns prior to the expiration of the two-year period, and the restrictions in his or her employment agreement are not supported by additional consideration beyond the offer of employment, the employer may not be able to enforce the restrictive covenants against the resigning employee.

A number of commentators have strongly criticized the *Fifield* decision. Some submit that the opinion disregards prior case law and reads more like a legislative mandate with its two-year requirement. Others suggest that courts should not mechanically apply a formula in determining what constitutes sufficient consideration to support a restriction. They also submit that whether an employee voluntarily resigns should be a factor.

It is too early to tell, but there is some speculation that employers may be able to avoid the effects of the *Fifield* decision by offering more than simply employment, compensation, and benefits at the outset of the employment relationship in return for restrictive covenants. For example, an employer might offer a term of years rather than employment on an at-will basis, a special bonus, or a meaningful, continuing benefit or perquisite that would not otherwise be offered. It would be advisable for an employment agreement to specifically mention the additional consideration and have the employee acknowledge its receipt and adequacy and that the consideration is offered specifically in return for the restrictive covenants.

Such additional consideration could go a long way to preventing an employee from successfully avoiding the restrictions by resigning prior to the completion of the second year of his or her employment

agreement. In the event of litigation, it could also lead a court to distinguish the employment relationship from the situation that arose in the *Fifield* case.

There have not been any reported decisions interpreting *Fifield*, though this is sure to change. Moreover, the Illinois Supreme Court has been asked to review the Illinois Appellate Court's decision. For the time being, employers would be wise to consult with their legal counsel before entering into new employment agreements containing restrictive covenants. Moreover, they would be prudent to re-examine their existing employment agreements that contain restrictive covenants.

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