CHICAGOLAWBULLETIN.COM

Serving Chicago's legal community for 159 years

MONDAY, APRIL 7, 2014

Chicago Daily Law Bulletin®

Volume 160, No. 68

Challenges in enforcing restrictive covenants in Illinois

In a June 24, 2013, decision, 1st District Illinois Appellate Court ruled that at least two years of continued employment by an at-will employee was required to constitute the "adequate consideration" necessary to support a valid non-competition and non-solicitation agreement, also commonly referred to as a restrictive covenant. *Fifield v. Premier Dealer Services, Inc.*, 993 N.E.2d 938, 373 Ill.Dec. 379 (1st District, 2013).

Fifield has caused Chicago employers angst and called into question the enforceability of many existing restrictive covenants applicable to employees hired in the past two years. For example, an employer may not be able to enforce a restrictive covenant against an employee who voluntarily resigns after 23 months.

To the surprise of many legal observers, on Sept. 25 of last year, the Illinois Supreme Court declined to review the *Fifield* decision. The exact reasons for the court's decision not to review the case are unknown; perhaps it agreed with the circuit court's ruling, or it is waiting for a clearer split among Illinois Appellate Court district. However, given the contradictory rulings of the lower Illinois courts, it appears that the issue of what constitutes adequate consideration necessary to support a valid restrictive covenant is ripe for a decision from Illinois' highest court.

The U. S. District Court for the Northern District of Illinois has rejected the *Fifield* holding.

The Illinois Supreme Court's failure to take the case has not gone unnoticed. Citing "a lack of a clear direction from the Illinois Supreme Court," the U.S. District Court for the Northern District of Illinois recently declined to apply a "bright line rule" in its determination of the length of time of employment required to satisfy the "substantial period" of employment requirement when at-will employment is under consideration. *Montel Aetnastak Inc. v. Miessen*, No. 13 C 3801, 2014 WL 702322, at *16 (N.D.Ill., Jan. 28, 2014).

In its rejection of *Fifield*, the U.S. District Court stated that it would use "the fact-specific approach employed by some Illinois courts." Id. This is the approach the 1st District Illinois Appellate Court took nearly 30 years ago in *McRand Inc. v. van Beelen*, 486 N.E.2d 1306, 93 Ill.Dec. 471, (1st Dist., 1985).

In *McRand*, the court considered the raises and bonuses received by the defendants, their voluntary resignation and the increased responsibilities they received after signing a restrictive covenant as part of its analysis to determine whether sufficient consideration was provided to enforce restrictive covenants. Id.

The *Montel* court went on to conclude that the defendant's 15-month term of employment, coupled with her voluntary resignation, fulfilled the necessary "substantial period" of employment and was adequate consideration to support the enforceability of the restrictive covenant. *Montel*, 2014 WL 702322, at*16.

(E)mployers should cease to think of restrictive covenants as merely boilerplate language and specifically negotiate the restrictive covenants.

Employers likely to litigate in the Illinois circuit courts have limited options.

Employers who are able to seek enforcement of restrictive covenants in the U.S. District Court may be able to argue that the *Montel* court's approach is instructive and that the *Fifield* ruling should not apply. However, employers who may be required to litigate in the Cook County Circuit Court should consider their options for enforcing restrictive covenants against former employees.

Although there is some speculation that *Fifield* may only apply to the enforcement of restrictive covenants of two years or more, an examination of the cases cited in *Fifield* shows support for the proposition that two years is minimum. *Fifield*, 993 N.E.2d at 938. If employers are serious about restrictive covenants, they should immediately address the adequacy of consideration issue.

NEXT CHAPTER

MATTHEW C. LUZADDER

Matthew C. Luzadder is an attorney in the Chicago office of Kelley, Drye & Warren LLP. His practice focuses on complex commercial litigation, white-collar crime and labor and employment litigation. He can be reached at mluzadder@kelleydrye.com.

First, as a general matter, employers should negotiate adequate consideration at the outset of the relationship with new employees. This consideration may include the grant of stock options, bonuses or severance packages and should be specifically tied to the restrictive covenants in the employment agreement.

Second, with regard to current employees who have been with the employer for less than two years, the employer will have to provide additional consideration and require the employee to acknowledge the receipt of the consideration. However, there are few cases that provide guidance to employers on form and amount of consideration.

Before providing additional consideration to an employee, the employer should look carefully at the employee's total duration of employment, not just the date the restrictive covenant was signed. Courts may consider the duration and nature of the overall relationship between the parties when applying *Fifield*.

In *Novas v. Keith*, No. 2013-CH-07568, 2013 WL 5409730, at *7 (Cir. Ct. of Cook County, Aug. 7, 2013), the court determined that although the employment agreement containing the restrictive covenant stated that it superseded the original agreement (which contained an identical restrictive covenant), the previous six years that the former employee had worked for the employer was adequate consideration to support the current restrictive covenant.

The company should determine each employee's total term of employment and only provide additional consideration when necessary.

Even if the parties believe they have negotiated adequate consideration, the employee may later deny the consideration is adequate. In *Klein Tools Inc. v. Stanley Black & Decker Inc.*, No. 13-CH-13975, 2013 WL 6149305 (Cir. Ct. of Cook County, Oct. 16, 2013), the court found that the employee's negotiation for an additional week of vacation time was not sufficient consideration and was illusory. Id. at *3.

Although the defendant in *Klein Tools* would accrue vacation time at a faster rate than other new employees, which would ultimately amount to an extra week of vacation, the additional vacation time might never fully or even partially accrue because the defendant's employment was at-will and he could be terminated at any time. Therefore, the court held, the restrictive covenants were not enforceable under Illinois law.

Because it is unlikely that the Illinois Supreme Court will reject the basic proposition of *Fifield* and its predecessors that some "substantial period" of employment is necessary to be considered adequate consideration in support of a restrictive covenant, employers should cease to think of restrictive covenants as merely boilerplate language and specifically negotiate the restrictive covenants.