TO COMPETE OR NOT TO COMPETE: APPELLATE COURT RULING COULD MEAN CHANGES FOR EMPLOYERS AND NON-COMPETE RESTRICTIONS

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Non-competition restrictions in employment agreements may be difficult to enforce after a recent Illinois Appellate Court ruling. The court ruled that post-employment non-competition restrictions for new employees are not enforceable if the employment relationship ends within two years. To enforce non-compete agreements with new employees, employers must now offer a form of consideration, such as a signing bonus, other than simply the promise of future employment.

In the case Fifield v. Premier Dealership Services, the court ruled that in order to enforce post-employment non-competition restrictions in employment agreements, an employer must employ an employee for at least two years or offer other adequate consideration to the employee, such as a signing bonus in exchange for the employee's agreement not to compete with the employer, post-employment. Fifield v. Premier Dealership Services, 2013 IL App (1st) 120327.

The employee in the Fifield case, who worked in the automobile insurance and finance industry, executed an employment agreement that precluded him from competing with the employer for two years after termination. This restriction, however, did not apply if the employee was terminated "without cause during the first year of employment." The employee resigned three months after executing the employment agreement and went to work for a competitor.

The Illinois Appellate Court held that the non-compete restriction was invalid because it lacked "adequate consideration," stating that where the only consideration given to the employee is the promise of future at-will employment, "there must be at least two years or more of continued employment to constitute adequate consideration."

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The Fifield decision presents two questions that all employers must address.

• How can an employer best ensure that non-competition provisions in employment agreements with new employees can and will be enforced?

• For current employees with non-compete agreements who have been employed for less than two years, what can the employer do to protect itself?

The answer to both of these questions is that the employer must offer the employee "adequate consideration" in exchange for the non-compete restriction. Although there is scant Illinois law on what constitutes "adequate consideration" for enforcement of a non-compete provision, it is clear that the consideration for the non-compete must be more than the salary and benefits that the employee will receive or currently receives for his or her employment. Therefore, after Fifield, an employer now must offer something in addition to regular salary and benefits — that is, something that the employee is not entitled to or would not normally receive simply for his or her employment. Courts outside of Illinois have held that additional adequate consideration includes: a signing bonus, stock options, a year-end bonus, managerial or other specialized training that could lead to career advancement, unconditional severance benefits at the end of employment, or a raise or promotion (for current employees).

Having determined what additional consideration will be offered, an employer must then determine what amount is adequate. Although there is no precise formula to ascertain what amount is adequate under the law, courts look at the amount of consideration on a case-by-case basis, based on the employee's salary, education, experience, and industry custom and practice. For example, courts have found that signing bonuses of $500.00 and $2,000.00 in consideration for a non-compete in an employment agreement were sufficient additional consideration to make non-compete restrictions enforceable.

In addition to consideration, to create an enforceable non-compete provision, an employer must show that: (1) it has "a legitimate business interest" in need of protection by the non-compete, which requires that: (a) the employer has "near permanent customer relationships" and/or (b) the employee has access to the employer's confidential information; and (2) the restrictions are reasonable in geographic and temporal scope — for example, the employee cannot compete for one year and within five miles of employer.

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