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5 Steps For Ill. Employers Post-Fifield

Law360, New York (August 30, 2013, 12:24 PM ET) -- The Illinois Appellate Court recently issued a decision in Fifield v. Premier Dealer Servs. Inc.[1] holding that the promise of "at-will" employment alone is insufficient consideration to support a valid noncompete covenant under Illinois law. The court went on to find that two or more years of continued at-will employment is required to constitute adequate consideration to support such a covenant.

In light of this decision, Illinois employers should consider whether to restructure at-will offers of employment when a noncompete from a new hire is desired. Employers who entered into noncompetes with newly hired employees within the last two years based solely on at-will employment should also consider entering into new noncompete agreements supported by additional consideration.

Generally, a noncompete will be enforceable in Illinois if it is reasonable in scope (including a geographic limitation) and time as is necessary to protect a legitimate business interests, supported by adequate consideration and ancillary to an otherwise valid contract. Illinois courts have long held that the illusory promise of at-will employment was not adequate consideration to support a noncompete entered into after the employment relationship has already begun, unless such employment continued for a "substantial" period of time.

Prior courts have found that two years of continued employment was sufficient consideration for a noncompete, but less than seven months was not in connection with agreements entered into after employment had already begun.[2] The Fifield decision, however, is the first time that an Illinois court has explicitly ruled that the offer of at-will employment was insufficient consideration for a noncompete entered into as a condition of and at the beginning of employment.

What is interesting about the Fifield case is that under its facts, the employee actually negotiated a provision that released him from the noncompete if he were fired without cause within 12 months. Otherwise, he agreed to a two-year post-employment noncompete as a condition of his being hired. After three months of employment, he voluntarily resigned and went to work for a competitor. He and his new employer then obtained a declaratory judgment that the noncompete was unenforceable for lack of adequate consideration.

This judgment was upheld by the Illinois Appellate Court, finding that at least two years of continued employment was necessary before there would be adequate consideration for a noncompete based on at-will employment.

Prior to the Fifield decision, courts looked at not only the length of employment but also a variety of other circumstances to determine the validity of consideration, including whether or not the employee terminated the employment relationship. Fifield now supports a bright-line rule requiring two years of at-will employment before a noncompete will be upheld.

This standard is applicable to all noncompetes governed by Illinois law, even those entered into prior to the Fifield decision. Accordingly, employees with current noncompete agreement who have been employed for less than two years may quit and ignore their noncompete agreements. Former employees who were terminated within two years of their employment (whether such termination was by the employer or by the employee) can also claim that their noncompetes are invalid.

In light of Fifield, Illinois employers should take the following steps.

Review Current Agreements for Adequate Consideration and Enforceability

A wholesale review of and/or execution of new noncompetes may not be necessary or practical unless the employer was already contemplating some additional compensation arrangements (such as a general stock option or other equity grant or bonus pool participation). Otherwise, at this time, it may be more prudent to just identify those employees who have the information or skills that could create a real disadvantage if they were to work for a competitor.

To the extent any such employee's noncompetes were entered into in the last two years, then such agreements should be reviewed in order to determine if they are supported by other consideration or whether new agreements supported by additional consideration are necessary.

While reviewing these noncompetes, employers should take the opportunity to determine whether or not the noncompete contains a reasonable geographic and temporal limitation and would otherwise be enforceable in Illinois.

Although the enforceability of a noncompete depends upon the relevant facts relating to that particular employee, noncompetes of two years of less, with limited geographical or client restrictions, have been found to be enforceable in Illinois.

Provide Additional Consideration

For new noncompetes, consider offering additional consideration beyond at-will employment, such as a bonus, stock options, severance or a fixed term of employment in order to support an otherwise enforceable noncompete.

Although there is little case law on what amount will constitute adequate consideration, given the Fifield decision, such amounts should be more than a de minimis. Offer letters, employment agreements and/or noncompete agreements should be revised to specifically indicate the additional consideration being given for the noncompete.

Consider Another Choice of Law

Consider whether or not another state law should govern the noncompete and, if so, whether such state should also be the choice of venue for enforcing the noncompete. If the employer or employee has nexus to another state and that state's law is not too dissimilar to Illinois law (other than the adequacy

of at-will employment as consideration), a choice-of-law provision choosing the law of that other state should be considered and discussed with legal counsel.

However, note, an Illinois court may not give effect to a choice of law provision if it determines that there is no nexus to that state, that Illinois has a greater interest in the matter or that the chosen state law is "repugnant' to Illinois law. Also, consider whether the laws of the other states considered present other challenges in enforcing noncompetes.

Consider Using Confidentiality Agreements

Review whether for some employees, a confidentiality or nondisclosure agreement may accomplish the same goal as the noncompete. The Fifield decision does not appear to impact the validity of such agreements, and accordingly, these types of agreement could keep employees who have confidential information from working for a competitor or at least be used to severely limit what an employee can do for a competitor.

Consider Assignment of Non-compete Agreements in Asset Acquisitions

Consider whether to accept an assignment of the prior employer's noncompete agreement with acquired employees as an acquired asset in an asset transaction instead of entering into new noncompete agreements. noncompete agreements may be assignable, and if the employee worked for the seller for more the two years, the adequacy of consideration for such noncompete arguably could already have been satisfied.

While the law concerning noncompete agreements continues to evolve, employers should consider the impact of Fifield and similar decisions upon any noncompete agreements that they have entered or rely upon with their at-will employees.

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[1] Fifield v. Premier Dealer Servs. Inc., No. 1-12-0327 (Ill. App. Ct. June 24, 2013).

[2] Two or more years of continued employment was adequate consideration for a noncompete in Diederich Insurance Agency LLC v. Smith, 952 N.E.2d 165 (Ill. App. Ct. 2011) and Lawrence & Allen Inc. v. Cambridge Human Resource Group Inc., 685 N.E.2d 434 (Ill. App. Ct. 1997), but seven months was insufficient in Brown & Brown Inc. v. Mudron, 887 N.E.2d 437 (Ill. App. Ct. 2008).