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Illinois Employers: Non-Competes May Require Longer At-Will Employment Periods

Employers may need to revisit non-compete agreements for new at-will employees or those employees hired within the last two years.

The Appellate Court of Illinois recently issued a decision holding that the promise of "at-will" employment alone is insufficient consideration to support a valid non-compete covenant under Illinois law.[1] The Court went on to hold 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 non-compete from a new hire is desired. Employers who entered into non-competes with newly hired employees within the last two years based solely on "at-will" employment should also consider entering into new non-compete agreements supported by additional consideration.

Generally, a non-compete will be enforceable in Illinois if it is (1) reasonable, (2) supported by adequate consideration and (3) 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 non-compete entered into after the employment relationship has already begun, unless such employment continued for a "substantial" period of time.[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 non-compete 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 non-compete if he were fired without cause within twelve months. Otherwise he agreed to a two-year post-employment non-compete 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 non-compete 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 non-compete based on "at-will" employment.

In light of *Fifield*, Illinois employers should consider offering additional consideration beyond at-will employment, such as a bonus, stock options, or a fixed term of employment in order to support an otherwise enforceable non-compete in Illinois.

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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 non-compete 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).