

SMITH O'CALLAGHAN & WHITE

33 NORTH LA SALLE STREET

SUITE 3800

CHICAGO, ILLINOIS 60602

TELEPHONE
(312) 419-1000

FACSIMILE
(312) 419-1007

WEBSITE
www.socw.com

ILLINOIS SUPREME COURT EASES BURDEN ON EMPLOYERS IN ENFORCING NON-COMPETE AGREEMENTS

On December 1, 2011, the Illinois Supreme Court issued a unanimous opinion favorable to employers who bring suit to enforce non-compete agreements against departing employees. Reliable Fire Equipment Co. v. Arredondo, Case No. 111871, 2011 Ill. LEXIS 1836, *27 (Ill. S. Ct. Dec. 1, 2011). The opinion removes the limitation on the factors that a court is authorized to consider when determining whether an employer has a legitimate business interest and thereby makes it easier for employers to enforce a non-compete agreement under Illinois law. The Court held: “[W]hether a legitimate business interest exists is based on the totality of the facts and circumstances of the individual case. . . . No factor carries any more weight than any other.” Id.

The Illinois Supreme Court in Reliable reaffirms the three-part reasonableness test used to determine whether to enforce a non-compete agreement, requiring that the restriction: (i) be no greater than is required for the protection of a *legitimate business interest*; (ii) not impose an undue hardship on the employee; and (iii) not be injurious to the public. Id. at *7. However, in Reliable, the Court alters the analysis used in determining whether a legitimate business interest exists under the first prong, abandoning the prior rigid test for a more flexible approach. Previously, based on a long line of cases, an employer’s legitimate business interest could only stem from threatened misappropriation of confidential information or interference with “near-permanent” customer relationships. Courts were foreclosed from considering the totality of the circumstances and employers were constrained in providing evidence of additional factors that would justify enforcement. This created a significant burden on employers, although not an insurmountable one. The Illinois Supreme Court in Reliable now holds that employers are not limited to protection of confidential information and near-permanent customer relationships as the exclusive factors showing a legitimate business interest. Id. at *27. Instead, an employer can put forward a broad array of factors unique to its particular case to justify enforcement of a non-compete agreement. Id.

Key Facts and Points of Law

The facts in Reliable involved a garden variety non-compete case. Two departing sales employees with non-compete agreements formed a rival business and left their employer to compete in the sale of fire alarms and fire suppression equipment. The employer brought suit to enforce the non-compete agreements. The trial court found the non-compete agreements unenforceable based on a finding of no legitimate business interest sufficient to justify enforcement. The Illinois Appellate Court affirmed. The Illinois Supreme Court reversed and remanded the case to the trial court to allow the parties to supplement the record with additional evidence that would demonstrate the existence of a legitimate business interest. Id. at *27-28.

The Illinois Supreme Court instructed courts to consider the full spectrum of relevant factors, including, but in no way limited to, “the near-permanence of customer relationships, the employee’s acquisition of confidential information through his employment, and time and place restrictions.” Id. at *27. However, the Court declined to offer further specific guidance on

additional relevant factors, stating: “[I]f it were possible to make a complete list today, human ingenuity would render the list obsolete tomorrow. . . . ‘Each case must be determined on its own particular facts.’” *Id.* at *25. In essence, the Illinois Supreme Court eliminated the long-standing and relatively rigid test, and opened the door to a wider, non-rigid, set of considerations.

While the Illinois Supreme Court did not offer additional relevant factors, employers in other jurisdictions have successfully relied upon the following, by illustration, to support a legitimate business interest: employee misconduct during and after departure, including seeking to poach other employees or engaging in deception, bad faith, fraud or other misconduct; serious disruption to the employer’s business due to sudden departure to a competitor; departing employee was the sole and exclusive contact for key customers, suppliers or relationships; employee had limited experience in the industry other than with employer; employee exposure to sensitive, albeit not confidential, internal business information; employee involvement in pending deals or proposals; significant length of time employee worked; and relatively narrow scope of geographic and time restrictions sought by employer that are closely tailored to the business interest at stake.

Implications for Employers

- Employers are still required to show a legitimate business interest sufficient to justify a non-compete agreement – that burden remains and is reaffirmed. The Illinois Supreme Court is clear that non-compete agreements are not automatically or blindly enforced.
- However, the Reliable opinion provides much greater latitude to employers in making their case that a legitimate business interest is at stake and demonstrating enforcement of a non-compete is warranted.
- Significantly, customer relationships no longer need to be near-permanent to constitute a legitimate business interest. It will be important how the lower courts interpret Reliable on this issue – specifically, whether any customers, without regard to duration of the relationship, may be protected.
- Other restrictive covenants, such as restrictions on the poaching of employees, may be easier to enforce given the expanded definition of legitimate business interest. By illustration, employers may be able to show their legitimate interest in maintaining a stable workforce given the expense and time required to hire and train experienced employees.
- Following Reliable, it remains critical to unearth bad acts by departing employees, particularly breaches of fiduciary duty. Such bad acts will be relevant to enforcement of non-competes given the Court’s repeated instruction to consider the totality of the circumstances.

Smith O’Callaghan & White

Terry J. Smith	terry.smith@socw.com
Robert R. Duda Jr.	robert.duda@socw.com
Allison P. Sues	allison.sues@socw.com

December 8, 2011

This is an update provided for informational purposes to our clients and friends.

©2011 Smith O’Callaghan & White