SMITH O'CALLAGHAN & WHITE
33 NORTH LASALLE STREET
SUITE 3800
CHICAGO, ILLINOIS 60602

TELEPHONE (312) 419-1000
FACSIMILE (312) 419-1007
WEBSITE www.socw.com

NEW ILLINOIS CASE INCREASES EMPLOYER'S BURDEN TO SHOW VALID CONSIDERATION FOR COMPETITION RESTRICTIONS

On June 24, 2013, the Illinois Appellate Court for the First District created a bright line rule requiring that continued at-will employment last at least two years in order to constitute adequate consideration for the enforcement of a competition restriction, regardless of whether the employee is terminated or voluntarily resigns. Fifield v. Premier Dealer Services, Inc., 2013 IL App (1st) 120327 (2013). Importantly, this two-year requirement applies whether the competition restriction was entered into at the outset of at-will employment or during the course of employment.

Key Facts and Points of Law

Eric Fifield began working for Premier Dealer Services, Inc. ("Premier") after signing a non-compete agreement, which prohibited him from competing against Premier in the automotive finance and insurance industry and from soliciting customers. He voluntarily resigned after only three months and began working for a competitor. The trial court refused to enforce the agreement for lack of adequate consideration. The Illinois Appellate Court's First District (based in Chicago and covering Cook County) affirmed, finding that the agreement lacked sufficient consideration because the only consideration was continued employment and Fifield had worked at Premier for such a short period of time. Significantly, in a departure from prior Illinois law, the Court went further in setting forth a rigid two-year requirement for continued employment.

The Fifield decision unequivocally holds that in the absence of any other consideration, continued employment for at least two years is required to enforce a competition restriction. Prior to this decision, Illinois courts assessed whether a period of continued employment was sufficient on a case-by-case basis. General benchmarks guided the process – seven months of employment was not long enough while two years was sufficient. The inquiry was also influenced by whether the employee voluntarily resigned (a relatively shorter period of employment may constitute sufficient consideration) or the employer terminated the employee (a relatively longer period of employment may be necessary). See e.g., Woodfield Group, Inc. v. DeLisle, 295 Ill. App. 3d 935, 943 (1st Dist. 1998) (remanding case to determine whether 17 months of employment was sufficient consideration to support competition agreement: "Factors other than the time period of the continued employment, such as whether the employee or the employer terminated employment, may need to be considered to properly review the issue of consideration."). Fifield conflicts with existing Illinois precedent by eliminating this factored analysis and replacing it with a bright line two-year requirement, regardless of whether the employee is terminated or resigns.

In addition to establishing the rigid two-year rule, Fifield also marks a major change by applying this bright line rule to a competition restriction entered into at the outset of employment. Fifield falls out of step with existing cases in Illinois and other jurisdictions that treat competition agreements entered at the outset of employment differently than midstream agreements when assessing consideration. Typically, courts summarily dispense with the consideration analysis for

competition agreements signed at the outset of employment, finding that where a competition restriction is an express condition of hiring, contained in a written agreement and signed at the time employment is offered and accepted, it is supported by sufficient consideration. In contrast, courts often closely analyze consideration for midstream competition agreements because they are not linked to an offer of employment and thus must be supported by some new consideration beyond immediate employment, such as a signing bonus or substantial subsequent continued employment.

Implications for Employers

- Under Fifield's bright line rule, continued at-will employment is only valid consideration for a competition restriction after the employee has worked for two years, regardless of whether the employee signed the competition agreement at the outset of employment or midstream. Illinois employers should be aware that their existing competition agreements may not be enforceable with respect to employees who resign prior to the second anniversary of their employment if the agreements are premised solely on the offer of employment or continued employment.

- Employers should consider revisiting their competition agreements to include additional consideration, such as a signing bonus, stock award, periodic bonus plan, salary increase, promotion, separation pay, increased access to confidential information, change in duties and responsibilities, guarantee of employment for a set period or other tangible, new benefits made contingent on signing competition agreements.

- Given the impact of the bright line rule established by the Court in Fifield, it is very likely that the case will be appealed to the Illinois Supreme Court. Notably, the Fifield decision reflects a stark departure from the Illinois Supreme Court's recent decision, which eases an employer's burden in enforcing competition restrictions. Reliable Fire Equipment Co. v. Arredondo, 2011 IL 111871 (2011) (employer may show competition restriction protects a legitimate business interest through a totality of circumstances analysis rather than through a rigid, formulaic approach).

- Finally, employers should be mindful that even if a competition restriction is unenforceable, employers still have other available means to address unfair competition by departing employees, regardless of their tenure, including claims under the Illinois Trade Secrets Act, as well as claims for breach of fiduciary duty and duty of loyalty, unlawful employee pirating, tortious interference with prospective economic advantage stemming from improper customer solicitations, unfair competition, unjust enrichment and conversion.

Smith O'Callaghan & White
www.socw.com

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

July 16, 2013