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ILLINOIS FEDERAL COURTS CONTINUE TO REJECT BRIGHT-LINE TEST FOR CONSIDERATION IN COMPETITION RESTRICTIONS

One of the most significant issues in Illinois non-compete law for 2017 will be much-needed clarification by Illinois state and federal courts on the bright-line rule, set forth in Fifield v. Premier Dealer Services, that continued at-will employment must last at least two years in order to constitute adequate consideration for the enforcement of competition restrictions. The starting point will be two recent Illinois federal court decisions described below that reject the bright-line rule.

Since the well-publicized Fifield decision by the Illinois Appellate Court in 2013, a split has developed between Illinois state courts and Illinois federal courts on whether Fifield's bright-line rule properly reflects Illinois law. Recently, two more federal courts in Illinois have further solidified the split in authority, rejecting the bright-line rule requiring continued employment to last for at least two years in all cases and opting, instead, for a totality of the facts and circumstances approach in line with the Illinois Supreme Court's 2011 decision in Reliable Fire Equipment Co. v. Arredondo, addressing overall enforcement of competition restrictions.

Key Facts and Points of Law of Federal Court Decisions

In the first decision, Airgas USA, LLC v. Adams, 2016 WL 3536788 (N.D. Ill., June 27, 2016), Judge Reinhard denied a former employee's motion to dismiss the plaintiff employer's breach of contract claim that sought to enforce a non-solicitation of customer restriction against the former employee. The former employee voluntarily resigned and went to work for a competitor, in the same capacity as territorial sales manager, one year and seven months after he signed the customer non-solicitation agreement. He sought dismissal of the complaint on the basis that the agreement lacked consideration because he was not employed for the requisite two years after signing the competition restriction. In rejecting the two-year bright-line rule, the federal court joined several other federal courts in Illinois, which have determined that it is probable that the Illinois Supreme Court would likewise reject the bright-line test in favor of a more flexible case-by-case determination that considers all of the facts and circumstances of the particular case.

In the second decision, Allied Waste Services of North America, LLC v. Tibble, 177 F. Supp. 3d 1103 (N.D. Ill. 2016), Judge Leinenweber similarly denied a former employee's motion to dismiss the plaintiff employer's action for breach of a non-compete agreement. The federal court refused to apply the two-year bright-line rule announced in Fifield and joined those federal courts in Illinois that have predicted the Illinois Supreme Court would adopt a more fact and case-specific approach considering the totality of the circumstances. In this case, the federal court held the complaint alleged adequate consideration to support the non-compete agreement where the employee worked 15 months after signing the non-compete, voluntarily resigned and received a promotion and pay increase in connection with executing the agreement.

Implications for Employers

- The continued split between Illinois state and federal courts on whether Illinois law mandates a bright-line requirement of two years of continued at-will employment (in the absence of any other consideration) to enforce competition restrictions increases the potential for forum shopping. The timing of the action and proper venue may be critical as the enforceability of the competition restrictions may turn on whether the action is brought in Illinois state court or federal court.

- Although the Illinois federal courts have not set forth a comprehensive list of what fact circumstances should be considered in assessing the consideration question, relevant factors would include: length of employment, whether the employee voluntarily resigns or is involuntarily terminated, any raises or bonuses received by the employee or an increase in duties or responsibilities received after signing an agreement with competition restrictions – all of which suggest that the employer's offer of continued employment was legitimate, made in good faith and not illusory.

- The Allied Waste case illustrates the potential hazard in restarting the clock on continued employment by rolling out new and updated competition restrictions that replace existing agreements, so-called mid-stream agreements. Employers need to weigh the benefit of such updated agreements against any potential enforceability issue if the employee leaves shortly thereafter and continued employment is the only consideration offered by the employer to support the updated agreement.

- Regardless of whether an enforceable competition restriction exists, employers may have other available non-contractual claims against the departing employee. For example, in both cases described here, the federal court refused to dismiss the employer's claims for misappropriation – even without specific allegations of any actual taking, use or disclosure of the trade secrets, where the respective complaints alleged the departing employee would *inevitably* use or disclose the trade secrets in his new position with a competitor.

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