

ALERTS

Labor & Employment Law Alert - Employers Take Note: Illinois Appellate Court Decision Will Make It Harder For Illinois Employers To Enforce Their Non-Compete Agreements

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The Illinois Appellate Court has recently issued a decision departing from the commonly understood principle that an offer of employment to a new employee is sufficient consideration to support the enforcement of post-employment restrictions.

In *Fifield v. Premier Dealer Services, Inc.*, 2013 Ill. App. LEXIS 424 (June 24, 2013) (*Fifield*), Fifield and his subsequent employer filed a motion asking the court to invalidate certain post-employment restrictions (including non-solicitation and non-competition provisions). Fifield was laid off by his prior employer when the division in which Fifield worked was purchased. The purchaser subsequently offered Fifield a job, but required that he sign the non-compete and non-solicit agreement as a condition of employment. Fifield accepted (and signed the agreement) but after approximately three months on the job, Fifield left the purchasing firm and went to work for a competitor.

In declining to enforce the non-compete and non-solicitation provisions, the court held that three months of continued employment was not sufficient consideration to support the post-employment restrictions. The court further indicated that it would generally take at least two years of ongoing employment to support such post-employment restrictions. This rule, according to the court, applies regardless of whether the employee is terminated or resigns.

The *Fifield* court reasoned that an offer of employment, and even the promise of continued employment, is often an illusory benefit when the employment may be terminated at any time by the employer. Accordingly, the court reasoned that neither an offer of employment nor employment lasting less than two years is adequate, by itself, to support a non-compete.

Fifield represents a stark departure from the commonly understood principle that an offer of employment to a new employee is sufficient consideration to support the enforcement of an agreement containing post-employment restrictions. Under a more traditional understanding of such agreements, employers could rest assured that their non-competes would be enforced regardless of how long an employee stayed with the company. Not anymore.

To be sure, *Fifield* is a concern for Illinois employers. The case reflects the increasing hostility that courts have shown toward post-employment restrictive covenants. *Fifield* sees Illinois courts following in step with what some federal courts have been doing: collapsing the distinction between

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pre-hire and post-hire restrictive covenants for purposes of determining whether adequate consideration supports them. *Fifield* unambiguously holds that – absent some type of additional consideration beyond the mere offer of employment itself – there must be at least two years of ongoing employment for the restrictive covenant to be enforceable.

In light of *Fifield*, Illinois employers should consult with counsel for advice on the enforceability of post-employment restrictive covenants.

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