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Illinois Adopts Two-Year Employment "Rule of Thumb" For Enforcement of Non-Competition Agreements

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On December 11, 2014, Illinois' Third Appellate District joined the First Appellate District in holding that at-will employees must be associated with an enterprise for two years before any non-competition agreement they sign can be enforced. An at-will employee's separation before two years have passed – even by voluntary resignation – can render consideration for the non-competition agreement inadequate unless the employer provided additional benefits going well beyond employment and regular compensation.

In *Prairie Rheumatology Associates v. Francis*,[1] the court considered the enforceability of a non-competition agreement entered into between Dr. Francis and Prairie Rheumatology that prohibited Dr. Francis from competition with Prairie Rheumatology for two years, within 14 miles of Prairie Rheumatology's offices. The agreement was effective April 9, 2012, and Dr. Francis resigned effective November 22, 2013. Following the First Appellate District's lead, the court held that consideration for non-competition agreements is generally inadequate as a "rule of thumb" unless and until an at-will employee is employed for two full years. As Dr. Francis was only employed by Prairie Rheumatology for approximately 19 months, the appellate court found that the non-competition agreement lacked consideration and reversed the trial court's order granting a preliminary injunction.

The Third Appellate District's decision is significant, as it contributes to a growing dispute between courts applying Illinois law on the validity of the "2-year rule" established by the First Appellate District in *Fifield v. Premier Dealer Services, Inc.*[2] The Illinois Supreme Court declined to review the First Appellate District's decision in *Fifield*, depriving the courts and litigants of any clear guidance on the issue. Federal District Court judges are split on whether or not the "2-year rule" is a mandatory requirement or simply a useful guideline.[3] The Third Appellate District is the first of Illinois' five appellate districts to weigh in on the issue following *Fifield*. It is worth noting, however, that other appellate districts have addressed the enforceability of non-competition agreements in the at-will employment context without discussing adequacy of consideration – perhaps in an effort to avoid taking a position.[4] Thus, while the First and Third Appellate Districts now require two years of employment for at-will employees to show adequate consideration for a non-competition agreement, the rule remains unclear in the Second, Fourth and Fifth Districts, and in federal courts applying Illinois law.

As a saving grace for employers looking for certainty in this arena, the Third Appellate District in *Prairie Rheumatology* appears to recognize that consideration other than the mere fact of employment can support enforcement of a non-competition agreement where the relationship lasted less than two years, provided the additional consideration is significant and not illusory.[5] Simply reciting additional consideration in the agreement, however, will not be sufficient if the employer does not follow through. For example, Prairie Rheumatology promised to introduce Dr. Francis to potential business partners, pay for certain credential applications, and expedite her professional advancement. The court found, however, that Prairie Rheumatology failed to show it had actually done these things, and that therefore the promises were "illusory … at best."[6]

The enforceability of non-competition agreements as against individuals employed on an at-will basis for less than two years will remain difficult to predict, until all other Appellate Districts adopt the rule or the Illinois Supreme Court weighs in. However, providing employees with additional benefits beyond the act of employment may increase the likelihood of establishing adequate consideration should the relationship later result in litigation.

Endnotes

1 *2014 IL App (3d) 140338.*

2 *2013 IL App (1st) 120327*

3 *See Montel Aestnastak, Inc. v. Miessen, 998 F. Supp. 2d 694, 716 (N.D. Ill. 2014) (J. Castillo) (rejecting Fifield's "bright line rule," finding that appropriate test is whether employee was employed for a "substantial period," which could in some circumstances be as short as one year); Instant Tech., LLC v. DeFazio, No. 12-491, --- F. Supp. 2d ----, 2014 WL 1759184, *14 (N.D. Ill. 2014) (J. Holderman) (predicting that the Illinois Supreme Court would follow Fifield and "clearly define a 'substantial period' as two years or more of continued employment").*

4 *See Critical Care Systems, Inc. v. Heuer, 2014 IL App (2d) 130745.*

5 *2014 IL App (3d) 140338, ¶¶ 17-18.*

6 *Id.*

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the author:

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