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Since *Fifield* Is Not Going Away Any Time Soon, Illinois Employers Should Consider Revising the Consideration Provided for Restrictive Covenants

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In June 2013, the Illinois Appellate Court for the First District (i.e., Cook County) held that, absent other consideration, two years of employment is required for a restrictive covenant to be deemed supported by adequate consideration—even where the employee signed the restrictive covenant as a condition to his employment offer and even where the employee voluntarily resigned. *Fifield v. Premier Dealer Services, Inc.*, Docket No. 1-12-0327 (Ill.App. 1 Dist. June 24, 2013). To our knowledge, *Fifield* is the only Illinois state court decision to hold that an offer of employment *by itself* is insufficient consideration for a restrictive covenant; neither the Illinois Supreme Court nor any other Illinois appellate district has so held.

Fifield generated significant discussion among practitioners, as well as some expectation that the Illinois Supreme Court would weigh in. However, in September 2013, the Illinois Supreme Court decided not to review *Fifield* and, to date, no published decision has either cited it or applied it. Furthermore, the state legislature has taken no action to legislatively modify *Fifield*, nor does any such action appear imminent.

What Employers Should Do Now

Absent further developments in the Illinois courts (such as a split among the state appellate districts) or legislative intervention, Illinois employers hoping to enforce restrictive covenants within two years after the signing date should be prepared to distinguish *Fifield* factually or legally. Employers that are concerned about their ability to do so, or that want to err on the side of caution, should act now to address the implications of *Fifield.*

Accordingly, employers should consider these options:

1) Where there is a plausible nexus to another state, an employer can include a choice-of-law provision designating the law of a state with more favorable laws regarding the enforceability of restrictive covenants (e.g., the state where the employer's headquarters is located or where the employee actually works). Illinois courts generally enforce contractual choice-of-law provisions unless they violate the fundamental public policy of a state with a materially greater interest in

the situation or where the parties and contract do not have a substantial relationship with the chosen state.

2) Employers can provide consideration in addition to an offer of employment or continued employment. Examples of such possible "additional consideration" include a cash payment, stock options, training, education, a raise, additional paid time off, guaranteed severance, or a promotion. Unfortunately, while *Fifield* suggests that such "additional consideration" is required in order to enforce a covenant against an employee employed for less than two years, it provides no guidance as to how much "additional consideration" would be required, and there is no Illinois case law that sets out a formula as to how much consideration is appropriate in a given circumstance. In the absence of judicial guidance, it would be prudent for an employer to be as generous as possible and to provide consideration that is more than *de minimis* (e.g., offering "additional consideration" with a monetary value of at least $1,000).

3) Employers can agree to continue the employee's salary during any restricted period, thereby alleviating the concern in *Fifield* about consideration being illusory.

4) Employers can evade *Fifield* entirely by having employees agree to a "garden leave" or "required notice" clause, rather than a traditional non-compete or non-solicit clause. Under such a provision, an employee is required to give advance notice of his or her resignation (e.g., 30 – 90 days) and, during the notice period, the employee remains on the employer's payroll and owes the employer a fiduciary duty of loyalty (and therefore cannot work for a competitor during that period). "Garden leave" is a concept that arose in the United Kingdom and, over the past few years, has begun to become more common in the United States. Although there are relatively few cases interpreting garden leave clauses in the United States, because the employee remains on the payroll and because garden leave provisions tend to be shorter in duration than traditional restrictive covenants, they are less onerous to the individual and thus more likely to be enforced.[1]

Regardless of the "additional consideration" ultimately decided upon, the restrictive covenant itself should both explicitly recite the consideration provided to the employee for signing it and further provide that the employee acknowledges the consideration and its adequacy.

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[1] It should be noted that notice periods need not be "mutual." In other words, if an employer requires an employee to provide notice of his or her resignation, the employer is not, therefore, required to provide the employee with notice of its intent to terminate the employee's employment. Further, employers often vary the length of notice periods, depending on the employee's position or level. In other words, more senior employees, or employees with access to additional confidential information, are often required to provide more notice than more junior employees or employees with less access to confidential information. Finally, an employer may reserve the right to shorten the notice period provided by an employee (and not pay for any period of shortened notice) if it determines, upon the employee providing notice, that the entire period of notice is not required.

For more information about how to address the potential implications of *Fifield* for Illinois employers, please contact:

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