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News & Types: Employment, Labor & Benefits Update

Noncompete Unenforceable Where Employee Worked Less Than 2 Years

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Practices: Employment, Labor & Benefits

EXECUTIVE SUMMARY:
Many companies utilize noncompete agreements to prevent former employees from going to work for a competitor. For a noncompete agreement to be enforceable, companies must provide something of value (money, stock, other benefits) in exchange for an employee's promise not to compete. While continued employment can be adequate consideration, Illinois courts have recently held that an at-will employee will likely need to be employed for at least two years before some Illinois courts will enforce the noncompete agreement, unless there is some other additional consideration. As a result, new employee offer letters may need to be revised to specifically refer to the additional consideration being provided to the employee.

In a decision issued in late June, an Illinois appellate court refused to enforce a noncompete agreement that a Harley Davidson dealer required when it rehired a salesman after he quit and went to work for a competitor for one day. When the salesman left to work for the same competitor 18 months later, the Court, applying its 2013 decision in *Fifield v. Premier Dealer Services*, held that the noncompete was unenforceable because he had worked for less than two years after signing the agreement and was not given additional benefits at the time of signing. *McInnis v. OAG Motorcycle Ventures, Inc*., 2015 Il App (1st) 130097.

When he was originally hired by OAG Motorcycle, Chris McInnis did not sign a confidentiality or non-competition agreement. After three years, McInnis quit and went to work for another Harley Davidson dealer, but changed his mind after one day and asked for his job back at OAG Motorcycle. OAG Motorcycle agreed to rehire McInnis, but concerned that he might leave again, required him to sign a confidentiality agreement that included an 18-month noncompete that prohibited him from working for another Harley Davidson dealer within 25 miles of OAG Motorcycle. He signed the agreement on October 24, 2012 and worked there until May 2014 when he quit to work for the same competing dealer. McInnis filed suit seeking a judicial determination that the restrictive covenants were unenforceable.

In 2013, the *Fifield* Court held that two years of employment is sufficient to establish adequate consideration. However, the *Fifield* Court noted that there could be other or additional factors that would override the two-year employment requirement. In this case, the appellate court upheld the trial court's application of *Fifield*. When he was rehired and required to sign the agreement, McInnis received no bonus, modification to his compensation rate or structure and no additional days off or any other benefits in exchange for the restrictive covenants. Essentially, the Court found that there was no evidence that OAG Motorcycle gave McInnis any

benefits in addition to those he would have received if he had not signed the agreement, therefore the restrictive covenants were unenforceable.

Fifield has been touted by some as bringing clarity to the enforcement of restrictive covenants and reviled by others as setting an arbitrary bright-line rule. It appears that Illinois courts will continue to use a fact-specific approach to determine the adequacy of consideration. The only certainty is that there is adequate consideration if an at-will employee has been employed for two years. Where the employee is employed for less than two years, employers will still be required to prove that something of value (in addition to continued employment) was provided in exchange for the employee's agreement.

Employers are well advised to consult with legal counsel prior to entering into restrictive covenants to confirm the terms are reasonable and that there is adequate consideration to support the contract.