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Alerts

A Second Illinois Appellate Court Finds Physician Restrictive Covenant Unenforceable

April 24, 2015
Health Law Alert

When hospitals, healthcare entities and medical groups employ physicians and mid-level practitioners through employment agreements, they generally include a covenant not to compete/covenant not to solicit ("Restrictive Covenant") in the agreements. In Illinois, for many years, as long as the Restrictive Covenant was reasonable in terms of geographic area and duration and was necessary to protect an employer's legitimate business interest, the Restrictive Covenant was considered enforceable. The offer of initial employment or continuing employment was considered to be sufficient consideration for the Restrictive Covenant.

Restrictive Covenants have been tested in Illinois courts on many different theories, and over the last several years, the determination on whether or not a Restrictive Covenant is enforceable has been evolving. In 2011, the Illinois Supreme Court in *Reliable Fire Equipment Company v. Arredondo* focused not on the geographic or temporal scope of the Restrictive Covenant, but rather on what was necessary to find a "legitimate business interest." In *Reliable*, the Illinois First District Appellate Court held that a Restrictive Covenant must meet the following three-prong test in order to be determined to be reasonable:

1. It is no greater than is required for the protection of a legitimate business interest of the employer;
2. It does not impose undue hardship on the employee; and
3. It is not injurious to the public.

In June, 2013, the Illinois First Appellate District Court, in *Fifield v. Premier Dealer Services, Inc.*, shifted the determination of whether a Restrictive Covenant was enforceable from the content of the Restrictive Covenant to whether there was sufficient consideration. Prior to *Fifield*, the Illinois courts routinely held that an offer of employment and continued employment was sufficient consideration. However, in *Fifield*, the First District for the first time held that, not only was continued employment not sufficient consideration, but, employment of less than two years was insufficient consideration for a Restrictive Covenant. The court further stated that two years was a requirement regardless of whether an employee was terminated or voluntarily left employment.

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The *Fifield* decision was appealed to the Illinois Supreme Court and most employers were waiting to see how the Illinois Supreme Court would handle this decision. However the Illinois Supreme Court denied certification on September 25 , 2013.

Until recently, the Illinois First Appellate District (Chicago area) was the only appellate court to require the two year minimum employment period as sufficient consideration for a Restrictive Covenant. However, on December 11, 2014, the Illinois Third Appellate District (central Illinois), in *Prairie Rheumatology Associates v. Francis*, agreed with the First Appellate District in holding that a physician's Restrictive Covenant with a medical group was unenforceable due to insufficient consideration.

In *Prairie Rheumatology*, a physician had an employment agreement with a two year Restrictive Covenant. The physician voluntarily resigned her employment after nineteen months, five months short of the two year *Fifield* requirement. Although the trial court upheld the Restrictive Covenant, on appeal, the Third District stated that other than the physician's employment contract, the physician received little or no additional benefit from her employer in consideration for the Restrictive Covenant. Therefore, the Third District held that in order for the Restrictive Covenant to be enforceable, the physician had to have been employed by the medical group for at least two years.

Recommendation:

After *Fifield*, we recommended that hospitals, medical groups and any entity within the Illinois First District using Restrictive Covenants provide some compensation as consideration for such covenants, and that hospitals, medical groups and other Illinois entities outside of the First District consider using such additional compensation as well. Now that two Illinois Appellate District Courts require two years of employment in order for a Restrictive Covenant to be enforceable (absent other good and valuable consideration), the two year requirement is clearly a growing trend in Illinois.

Therefore, our recommendation is that employers review their employment contracts in order to determine whether they contain tangible, identifiable and adequate consideration for the Restrictive Covenants. Examples of tangible, identifiable and adequate consideration are cash compensation directly allocated to the Restrictive Covenant, a signing bonus, grant of additional paid time off and other identified support from the employer to assist in the professional development and career of the employee, such as providing additional education and training. Any additional consideration offered should be tied expressly to the covenant in the employment agreement.

For more information, please contact Tom Luetkemeyer or your regular Hinshaw attorney.

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