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Noncompete Ruling Means Headaches For Ill. Employers

By **Ben James**

Law360, New York (August 01, 2013, 5:57 PM ET) -- A recent state appeals court ruling in Illinois could force companies there to offer employees more than just a job in order to ensure the validity of noncompete agreements, and could undermine existing agreements that limit workers' ability to jump ship to rival companies and solicit customers, lawyers say.

Premier Dealer Services Inc. — which had its attempt to enforce nonsolicitation and noncompete provisions rejected in the June 24 appellate decision — filed a petition Monday with the Illinois Supreme Court looking to overturn the decision, which lawyers say changed the landscape of the state's restrictive covenant law.

Premier, which provides after-market vehicle products and programs, is fighting the appeals court ruling that stemmed from a legal battle with former worker Eric Fifield, who jumped ship for a competitor a few months after signing an employment agreement with nonsolicitation and noncompete provisions.

What's at stake for employers in Premier's challenge — which is backed by the Illinois Chamber of Commerce — is certainty, said Peter Bulmer, a Chicago-based partner with Jackson Lewis LLP. Companies in the Land of Lincoln don't want to have to navigate five different standards, he said, referring to Illinois' five appellate districts.

“They just want to now what the rules are going to be,” Bulmer said of employers. “It's the uncertainty that creates the biggest problem.”

Last month's decision in Fifield v. Premier dealt with the consideration necessary to support a valid noncompete or nonsolicitation provision, and drew a bright-line rule requiring two years of continued employment in order to make such an agreement enforceable, lawyers said.

That means a noncompete or nonsolicit signed by a new hire who gets a job in exchange for acquiescing to the agreement will not be enforceable if that worker departs less than two years after coming on board.

And such agreements signed by existing employees less than two years ago may not be enforceable, pursuant to the logic of the June 24 decision.

That's problematic because many Illinois employers had been acting on the assumption that giving someone a job in exchange for signing noncompete or nonsolicitations pact was enough, lawyers said, adding that the ruling is at odds with the law in dozens of other states where new employment is sufficient to support an otherwise valid noncompete.

“The Fifield decision essentially goes against at least 40 other states' restrictive covenant law and it does so in a frankly very poorly reasoned opinion. The consequences are immediate because if you're an employer in Illinois who has executives or other employees who have signed noncompete or nonsolicitation agreements within the past two years, those agreements are now of highly uncertain enforceability,” Bulmer said. “There would have been no reason for an employer to think those agreements were not enforceable otherwise."

Morgan Lewis & Bockius LLP partner Thomas Hurka said that he had seen situations in which companies reissued noncompetes to workers, and that the recent ruling in Illinois could be setting up just such a scenario.

“It may be that if this decision stands, you'll see more of that happening,” Hurka said.

While lawyers said the decision was significant, some cautioned that generally, employers should not overreact or act too hastily.

“I'd be cautious as to jumping in and changing procedures and wait to see how the appeal comes out, but be mindful that there might be some significant changes coming in the future,” said Mayer Brown LLP counsel Maritoni Kane.

Companies in Illinois shouldn't automatically re-execute all their employment agreements, but it might be prudent to identify the employees who have information that could really hurt the employer if they were to depart with it, and perhaps redo those agreements with a bit of extra consideration included to seal the deal, Bulmer said.

The Fifield decision does give companies a reason to audit what may be outdated restrictive covenants and find areas for improvement, noted Sheppard Mullin Richter & Hampton LLP partner Kevin Cloutier.

When it comes to new hires in Illinois, companies can't simply rely on the new job as sufficient consideration for an enforceable noncompete or nonsolicitation pact, and should offer something else — such as a bonus or specialized training — to put themselves in the best position possible in the event of a dispute, according to Cloutier.

"Waiting on the Supreme Court to come in and change Fifield is a bad idea," Cloutier said.

New restrictive covenants should include language explicitly pointing out that the worker is getting something — and identifying that consideration — in exchange for agreeing to take on nonsolicitation or noncompete obligations, Hurka added.

While the Fifield decision raised doubts about the ability of employers to enforce certain agreements, lawyers said it was unlikely that the ruling would undermine confidentiality or nondisclosure agreements.

The Fifield decision is “sloppy enough” so that an aggressive lawyer could try and use it to attack a confidentiality pact, but the types of provisions at issue in the Fifield case and agreements to protect confidential data or trade secrets are “apples and oranges,” said Bulmer.

Hurka also said different standards were in play.

“Courts are more inclined to enforce confidentiality agreements or nondisclosure agreements, as long as you can demonstrate that the information is truly confidentiality or proprietary,” Hurka said.

Lawyers were wary of making predictions about whether the state's highest court would tackle the Fifield case and the consideration issue, but they did note that it had issued a landmark noncompete ruling at the end of 2011 in Reliable Fire Equipment Co. v. Arnold Arredondo.

That decision, which dealt with the standard for ascertaining whether there is a legitimate business interest that justified enforcing restrictive covenants, seemed to indicate that the Illinois high court favors broader and more expansive enforcement, said Hurka. The Fifield ruling “flies in the face of that,” he said.

In the Reliable Fire decision, the state Supreme Court was looking to bring Illinois common law in line with that of other states, and the high court could do the same with Fifield, according to Bulmer.

“I think it presents a question that our Supreme Court would view as the kind of question they should spend their time with,” Bulmer said of the Fifield appeal.

--Editing by John Quinn and Chris Yates.