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The Ever-Changing Landscape of Non-Compete Agreements

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Because they restrict trade and an individual's ability to earn a living, non-compete agreements are typically disfavored by courts across the country. In most instances, however, courts will consider enforcing a non-compete agreement if it is reasonably tailored to protect an employer's legitimate and protectable interest and as long as there is no harm to the public interest.

Each state has laws affecting the enforceability of non-compete agreements, and in almost every state these laws continue to evolve. For example, just two months ago, the Illinois Appellate Court issued a decision in *Fifield v. Premier Dealer Services, Inc.,* holding that an offer of employment to a new employee is not sufficient consideration to support the enforcement of post-employment restrictions. This is significant because, while most states agree that an offer of employment is sufficient consideration for a non-compete agreement, employers that operate in Illinois must now reconsider whether their non-compete agreements are supported by additional consideration to be enforceable.

In *Fifield*, the Illinois' Court indicated that not only was an offer of employment not sufficient consideration, but also that it would generally take at least two years of ongoing employment for sufficient consideration to exist and a non-compete agreement to be enforced. This holding is a drastic departure from the strong majority view to the contrary, and it further illustrates the disfavor with which these agreements are considered. The question, therefore, becomes how do employers draft agreements that satisfy the criteria of the various courts while protecting the interests of the employer, especially if that employer operates in multiple states.

First and foremost, employers must consider the laws in each of the states in which they operate. However, the recent decision from Illinois demonstrates how these laws are continually shifting, and employers must remain vigilant about staying abreast of these changes in order to protect the enforceability of their agreements.

Also, for an employer to be entitled to the protection of a non-compete agreement, the agreement must contain reasonable time and territory limitations. Time and territory limits generally cannot be more restrictive than is necessary to protect the employer's proven protectable interest. The analysis of the reasonableness of time and territory limits, therefore, is almost always extremely fact intensive. Facts that should be considered include, but are not limited to, the employee's territory or customer contact while employed, the extent of the employee's knowledge of confidential trade secret information, the size of the employer's industry, and the employer's geographic footprint.

Generally speaking, time limitations of less than two years have been found to be reasonable, although not always. Courts considering additional facts have upheld restrictions of as much as five years. The Indiana Court of Appeals in *Mayne v. O'Bannon Publishing Company, Inc.*, for example, recently upheld a five-year restriction as a result of the extent of the employee's work for the employer and the narrow territorial restriction contained in the agreement.

These recent decisions exemplify the ever-changing nature of the laws related to non-compete agreements and the need for employers to not only consider the laws of the states in which they operate when drafting non-

compete agreements, but also to stay in tune to the changes being made by the courts across the country.