

# Illinois Supreme Court Refuses to Review Decision That Invalidated a Noncompetition and Nonsolicitation Agreement for Lack of Consideration

In June, the First District of the Illinois Appellate Court (which covers Cook County) handed down a significant decision refusing to enforce, for lack of consideration, an agreement containing post-employment restrictions on competition between an employer and a new employee. Recently, the Illinois Supreme Court denied the employer's petition for leave to appeal, allowing the appellate court's decision to stand. The supreme court's inaction has significant consequences for employers in Illinois.

In *Fifield v. Premier Dealer Services*, Premier offered to employ Fifield contingent upon signing a contract that would bar him from competing with Premier or soliciting its customers for two years following termination of his employment. Fifield did not immediately accept; instead, he insisted on a provision that would void the covenants if Premier were to terminate him without cause during the first year of his employment. Premier agreed to this revision, and Fifield accepted employment and signed the contract.

Nevertheless, just three months later, Fifield submitted his notice of resignation to Premier and began working for a competitor in violation of the agreement. Fifield then filed a lawsuit seeking a declaration from the court that the contract was not valid because he did not receive sufficient "consideration" for his promise not to compete with Premier. The court agreed and entered judgment for Fifield.

The court of appeals affirmed. It rejected any distinction between a contract signed prior to the start of employment and one signed by a current employee. The court also noted that continuing employment was only "adequate" consideration if it lasted for at least two years after execution of the agreement and that the rule applies even if the employee resigns on his own accord. Because Fifield was employed for only three months after signing, the court determined that the contract was invalid and thus unenforceable, allowing Fifield to work for a competitor in violation of the restrictions to which he had agreed.

The Illinois Supreme Court's decision not to review the opinion in *Fifield* has significant consequences for employers in Illinois. Initial employment alone is no longer sufficient to support a post-employment restriction on competition.

## POSTED:

Nov 13, 2013

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Employees who work for less than two years for an employer can presumably violate a restrictive covenant without consequence if initial employment was the only consideration for the promise not to compete.

Employers must plan and act accordingly and should perform a review of existing restrictive covenants. The *Fifield* decision does not address other forms of consideration, such as a monetary payment, severance, or a fixed-term of employment, and employers should explore offering one of these to new employees who are asked to sign a restrictive covenant. It is possible, however, that following *Fifield* an Illinois court could determine that other types of consideration may be inadequate to support the sought-after restriction.

Additionally, employers could attempt to contract around the decision through a choice-of-law or venue-selection provision. If an employer is located in another state that has more favorable rules regarding consideration, the agreement could require a court to apply that state's law. Further, in-state employers that are not located in Cook County could require any lawsuits involving the contract to be brought in another district within the state. There is, however, no guarantee that such provisions would be enforced by a court.

If you have employees located in Illinois and have questions about the *Fifield* decision, please contact your Reinhart attorney or any member of Reinhart's Labor & Employment group.

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