RubinFortunato
Employment Law That Works

FOUR STATE COURT NON-COMPETE RULINGS IN 2014 ILLUSTRATE THE NEED FOR CAREFUL PLANNING WHEN ENTERING INTO A NON-COMPETE WITH AN EXISTING EMPLOYEE

The law surrounding restrictive covenants, including non-competes, is continuing to evolve. As with any contract, an employee's promise to restrict certain competitive activity is conditioned upon the employer's promise to give the employee some benefit or "consideration." When a non-compete agreement is entered into at the commencement of employment, this consideration requirement is satisfied by the new job itself. When entering into non-competes with *existing* employees, however, courts have varying views about whether something more than continuing employment - "additional consideration" - is required. Four recent state court decisions suggest that careful planning is warranted to navigate the patch work of state laws impacting the enforceability of non-competes entered into with existing employees.

In December 2014, the Supreme Court of Pennsylvania agreed to hear an appeal in *David M. Socko v. Mid-Atlantic Systems of CPA, Inc.*, in which the Court will decide an issue of first impression, namely whether a non-compete entered into with an existing employee is enforceable where no additional benefits or change in job status were provided to the employee, but where the agreement containing the non-compete states that both parties "intend to be legally bound." The Pennsylvania Superior Court held that, in such circumstances, the non-compete is unenforceable against the employee due to lack of consideration. In so doing, the Superior Court rejected the employer's argument that the "intend to be legally bound" language provided the requisite consideration in accordance with Pennsylvania's Uniform Written Obligations Act (UWOA). The UWOA states that a "written release or promise. . . shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement . . . that the signor intends to be legally bound." The Superior Court's refusal to enforce the non-compete in *Socko* is consistent with the Supreme Court of Pennsylvania's prior holdings that non-competes are enforceable only when supported by valuable consideration.

Similarly, in *Charles T. Creech v. Donald E. Brown and Standlee Hay Company, Inc.*, the Supreme Court of Kentucky held that, where nothing changed in his employment relationship after the employee

signed a three-year non-compete, the provision lacked consideration and was therefore unenforceable. The Appellate Court of Illinois for the Third District likewise struck down a physician's two-year non-compete for lack of adequate consideration in *Prairie Rheumatology Associates, S.C. v. Maria Francis, D.O.* Under Illinois law generally, courts do not review the adequacy of consideration; however, courts will do so in the case of non-competes and have held that two years of continued employment provides sufficient consideration. In *Prairie Rheumatology Associates,* the court found that the employee physician's resignation prior to that two-year mark failed to meet the requisite consideration.

Finally, in *Runzheimer International, Ltd. v. David Freidlen and Corporate Reimbursement Services, Inc.*, the Wisconsin Supreme Court has certified for appeal whether continued employment is sufficient consideration to support a non-compete between an employer and an existing employee. The Wisconsin Supreme Court has not previously tackled this issue. Interestingly, the court of appeals punted the issue to the Wisconsin Supreme Court for guidance without rendering a decision, noting the unsettled state of relevant law and public policy implications.

For more information about these cases or for advice about drafting, negotiating, or defending non-compete agreements, particularly for existing employees, please contact Michael J. Fortunato, Esquire, or Wendy R. Hughes, Esquire at 610-408-2000 or email them at MFortunato@Rubinfortunato.com and whughes@rubinfortunato.com.