7 Important Noncompete Rulings From The 1st Half Of 2015

By Ben James

Law360, New York (July 16, 2015, 10:37 PM ET) -- The biggest rulings from the first half of 2015 on noncompete clauses and other restrictive covenants show that courts are grappling with exactly what consideration an employee must receive in order for a pact to be enforceable, and experts expect that to continue in the second half of the year.

A Wisconsin Supreme Court decision from April that said continuing employment was enough consideration to support a restrictive covenant, as well as decisions from state appellate and federal district courts in Illinois addressing a 2013 ruling that said anything less than two years of continuing employment wasn't adequate, have highlighted the consideration debate.

In addition, lawyers are keeping an eye out for the Pennsylvania Supreme Court's ruling on a battle between a waterproofing business and a salesman who claimed that a noncompete pact he signed in 2010 wasn't enforceable because it didn't come with a change in employment status or any other...
benefits.

“The hottest issue in this area of the law continues to be the question of what consideration must be provided to an at-will employee when they sign a new or amended restrictive covenant,” said Peter Steinmeyer, co-chair of the noncompetes, unfair competition and trade secrets practice group at Epstein Becker & Green PC.

Law360 asked several experts on restrictive covenants which decisions that have come out in noncompete cases so far this year employers should have on their radar. Here they are:

**Runzheimer International Ltd. v. Friedlen**

This April 30 decision out of Wisconsin’s highest court was at the top of the list for lawyers asked about the biggest decisions in the restrictive covenant space this year. The case involved a longtime Runzheimer worker David Friedlen, who signed a restrictive covenant that included a noncompete after more than 15 years on the job.

Friedlen then kept working for the company for more than two years before being fired and taking a job with Runzheimer competitor Corporate Reimbursement Services. Runzheimer then sued Friedlen and CRS, and appealed after the trial court granted them summary judgment on the bulk of Runzheimer’s claims.

The intermediate appeals court said that the question of whether allowing an existing employee to keep their job in exchange for signing a restrictive covenant constituted sufficient consideration wasn’t adequately addressed under Wisconsin law. The state Supreme Court answered that question, holding that continuing employment was lawful consideration.

“I think we’re seeing, in 2015, a continuance of a trend, and that is that courts are more willing to look at the underlying factual circumstances that might support a noncompete,” said Faegre Baker Daniels LLP partner Terry Smith, adding that the Runzheimer ruling was a good illustration of that trend. “In the past, we ran up against some black-letter rules and some rigid tests.”

But while the pro-enforcement decision won plaudits from lawyers, it also left open questions. The opinion said that if an employer fired a worker “shortly after” signing, the employee would be shielded by other contract formation principles so that the covenant could not be enforced.

A concurrence from Judge Shirley Abrahamson said an “internal contradiction” made the majority holding “ambiguous and troublesome.”

Exactly how much time a Wisconsin employer would have to put off firing a worker who signs a noncompete in order to have the covenant deemed enforceable is still unclear, said Steinmeyer.

“It provided clarity with one hand, but uncertainty with the other,” he said of the Runzheimer decision.

**McInnis v. OAG Motorcycle Ventures Inc.**

This June 25 decision from Illinois’ First District Appellate Court applied the controversial June 2013 decision in Fifield v. Premier Dealer Services, which concluded that at least two years of continued employment were required to constitute the “adequate consideration” necessary to support a valid
restrictive covenant.

A lower court ruled against OAG and in favor of Chris McInnis, a top salesman who briefly left OAG and signed an agreement with noncompetition clauses when he returned in 2012. He then worked for OAG for 18 months after being rehired before leaving again.

OAG challenged the denial of its motion for a preliminary injunction, but the appeals court concluded that a lack of adequate consideration made the restrictive covenants against McInnis unenforceable, affirming the lower court.

But Justice David Ellis dissented, taking issue with the bright-line two-year rule and noting that cases like the OAG matter were “inherently fact-specific.”

“I simply disagree as to what that existing law is, and I disagree that we should follow it, in any event. I do not believe that a per se rule exists in Illinois, requiring that an at-will employee remain employed for at least two years — not one day less — after signing a restrictive covenant before sufficient consideration is found to exist,” Justice Ellis said in the dissent.

Lawyers said the 2-1 split in the OAG could be a sign that further debate on the two-year Fifield rule is in the cards.

“It’s quite interesting,” Steinmeyer said of the OAG ruling and the dissent, “because it suggests that maybe the issue isn’t resolved within the Illinois courts.”

**Bankers Life and Casualty Co. v. Miller**

Fallout from the Fifield decision isn't confined to state courts. In a Feb. 6 decision, the Northern District of Illinois rejected a motion to dismiss from former employees accused of breaching confidentiality and nonsolicitation provisions in employment contracts limiting their rights to compete with Bankers Life.

The worker-defendants argued that Illinois had a bright-line rule that continuing employment that lasts less than two years is insufficient consideration for a restrictive covenants, but the idea of such a rule didn't sit well with U.S. District Judge Manish Shah.

"The Illinois Supreme Court would ... reject a rigid approach to determining whether a restrictive covenant was supported by adequate consideration; it would not adopt a bright-line rule requiring continued employment for at least two years in all cases,” Judge Shah wrote.

Two other Illinois federal district court rulings have refused to apply Fifield, though one has.

The Bankers Life decision is significant because it shows that federal courts aren't necessarily going to follow Fifield, and may opt instead to look at the totality of the circumstances, said Kevin Cloutier, co-chair of Sheppard Mullin Richter & Hampton LLP's noncompete and trade secrets team.

“If your client has not provided consideration other than continued employment, the consideration analysis may differ depending on whether you are in federal or state court, given the differing application of Fifield, at least for now,” Cloutier said.

For companies with operations in multiple states, the easiest way to allay concerns about adequate
consideration may be to offer a bonus in exchange for workers' signing restrictive covenants, he added.

Though the Illinois Supreme Court declined to review the Fifield case, the ongoing controversy may mean that the state's highest court will eventually have weigh in on the two-year guideline, said Barnes & Thornburg LLP partner Bill Nolan, who added that clarification could benefit workers as well as employers looking to enforce restrictive covenants.

"No matter which side of the table you sit on, usually your clients want clarity," Nolan said.

**Brunner et al. v. Jimmy John's LLC et al.**

In this April 8 decision, an Illinois federal judge refused to invalidate confidentiality and noncompetition agreements sandwich shop chain Jimmy John’s LLC required its employees to sign.

U.S. District Judge Charles P. Kocoras dismissed the portion of Emily Brunner and Caitlin Turowski’s complaint that sought to invalidate the agreements and prohibit their enforcement. The workers claimed the pacts forbade them from sharing certain information about the company or working at nearby competitors.

The noncompete described by Brunner and Turowski’s suit has been the subject of media scrutiny and has drawn calls from members of Congress for a federal investigation of Jimmy John's. The plaintiffs said the pact restricted current and former employees from working for another business within three miles of a Jimmy John's location that generates more than 10 percent of its revenue from selling sandwiches.

The challenged noncompetes may have gotten Jimmy John's some bad press, but the company acted shrewdly from a litigation standpoint when it disclaimed any intention to enforce the pacts against the plaintiffs, who needed “reasonable apprehension” that they'd be sued, according to Steinmeyer.

“What Jimmy John's did was what I'd call anticipatory self-modification of an overbroad restrictive covenant,” Steinmeyer said. “I do think that was interesting from a tactical perspective.”

**Brown & Brown Inc. v. Johnson**

This June 11 decision out of the New York Court of Appeals said that applying Florida law on customer solicitation-related restrictive covenants would violate public policy, declining to uphold a Florida choice-of-law provision in an employment agreement signed by a New York resident.

The ruling comes in a case where a lower New York court ruled in February 2014 that the choice-of-law provision was unenforceable because it was “truly obnoxious” to New York public policy.

The decision not only underscores the importance of coordinating both choice-of-law and forum-selection clauses in restrictive covenants but should also serve as a reminder that courts might not always honor an employer's wish to have another state's law applied, noted Clifford Atlas, who leads Jackson Lewis PC's noncompetes and protection against unfair competition practice group.

“Certainly, it shows that a party's choice of law is not going to be absolute and guaranteed to be followed," Atlas said of the June 11 decision.

The Brown & Brown ruling also raises interesting questions about what New York courts might to do if
asked to apply California law, which disfavors noncompetes. In the Brown & Brown case, the court took issue with Florida law because it favored employers too much, but the employee-friendly California framework could also be seen at odds with New York public policy, according to Atlas.

“What would a New York court now say about California's law, which is at least as much, if not more, of an outlier?” Atlas asked.

**Ascension Insurance Holdings LLC v. Underwood**

This Jan. 28 decision out of the Delaware Chancery Court rejected Ascension's bid for a preliminary injunction against Alliant Insurance Services Inc. and a worker who allegedly breached a covenant not to compete.

The ruling noted that the underlying agreement selected Delaware as the venue for disputes and said that Delaware law would govern, and said that the parties' choice of law would generally control. But the court applied California law, and said that the relevant noncompete provisions would violate “a fundamental public policy” of the Golden State, which disallows contracts not to compete.

The employment agreement was negotiated in California between a California resident and a Delaware limited liability company that had its principal place of business in California, the opinion said, adding that the agreement not to compete was limited “almost completely” to parts of California.

The decision is a reminder that even in a jurisdiction that's historically been friendly to enforcing noncompetes, there's no guarantee that the state law the agreement says will govern will actually be applied.

“Simply picking a state without a proper nexus will likely not pass muster with reviewing courts, whether in Delaware or elsewhere,” Cloutier said. “Forum shopping is dangerous, and employers should give careful consideration to what state's law they choose, and base the choice on a legitimate, tangible contact to the state whose law they're choosing.”

**Golden v. California Emergency Physicians Medical Group**

This April 8 Ninth Circuit ruling stemmed from a race bias settlement agreement, not a noncompete, but it involved the section of California law that prohibits covenants not to compete and could have far-reaching implications in the state, Steinmeyer said.

A settlement between California Emergency Physicians Medical Group and a doctor who alleged racial discrimination sought to bar that doctor from working at emergency rooms owned or run by CEP.

The physician argued the deal was at odds with California Business and Professions Code Section 16600, which voids contracts that restrain parties from engaging in a lawful profession, claiming CEP’s wide presence in California and its ambitions to expand would substantially limit his ability to practice medicine.

A district court judge, however, denied the attempt to avoid enforcement of the settlement, ruling the section did not apply because the re-employment provision wasn’t a noncompete.

The Ninth Circuit overturned that ruling, finding that Section 16600 doesn’t limit itself to noncompete
clauses and may apply to the CEP case. The court declined to say if the agreement was actually void, tasking the lower court with additional fact-finding to determine if the provision created a substantial restraint.

Language waiving the right to work for an employer-defendant in the future is frequently part of settlement deals, but at least in the Golden State, that may not be the case for long, Steinmeyer said.

“IT’s a commonly included provision in settlement agreements or separation agreements, and this decision could change that practice or the breadth of the provision in California,” said Steinmeyer.

--Additional reporting by Matthew Bultman. Editing by John Quinn and Chris Yates.

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