Will Continued Employment be Adequate Consideration for a Wisconsin Non-Compete?

Apr 22 2014

Practice Area: Labor and Employment

In *Runzheimer International, Ltd. v. Friedlen*, the Wisconsin Court of Appeals was asked the age-old noncompete question: is continued employment sufficient to support a non-compete agreement entered into by an existing at-will employee? The Court of Appeals recognized that either way it answered this question, it would be required to ignore Wisconsin Supreme Court precedent. In order to avoid this impropriety, the court certified the issue to the Wisconsin Supreme Court for its guidance.

After 20 years of employment, Runzheimer International required Friedlen to sign a restrictive covenant agreement, which included a non-compete prohibiting Friedlen from providing restricted services to any of Runzheimer's competitors within a specific geographic area. At this point in the litigation, the parties had not actively disputed whether the non-compete terms were overbroad. However, Friedlen and his new employer successfully argued that Friedlen's continued employment alone was not sufficient consideration to support the non-compete. The agreement containing the non-compete did not increase Friedlen's salary and did not make him eligible for any new bonuses or other incentives. Rather, Friedlen only received the opportunity to continue working for Runzheimer as an at-will employee.

After the Circuit Court found that the non-compete was not supported by adequate consideration, Runzheimer appealed to the Court of Appeals. Runzheimer argued that the Wisconsin courts had not yet decided whether continued at-will employment was sufficient consideration for a non-compete. Runzheimer further argued that there should be no difference in how the court treats non-competes entered into at the start of employment as opposed to those entered into after years of employment because "every day is a new day both for employer and employee in an at-will relationship."

Runzheimer also cited to several other jurisdictions, including Illinois, in which continued at-will employment can constitute sufficient consideration for a non-compete, provided that an employee remains employed for a substantial period after signing the agreement. The Court of Appeals found that this viewpoint would require that Wisconsin make an exception to its rule that "the law will not inquire into the adequacy of consideration . . . only its existence." By requiring it to disregard Wisconsin's traditional rule that it would not evaluate consideration, the court noted that it would be required to ignore Wisconsin Supreme Court precedent.

The Court of Appeals also considered Friedlen's argument that the Wisconsin courts already have found that continued employment will not constitute sufficient consideration to support a non-compete. The court noted that at least one Wisconsin Supreme Court opinion relied upon this rule but was not convinced that the situations were factually similar.

After evaluating both arguments, the Court of Appeals concluded that both parties were "partially right" and found that "the law in Wisconsin regarding this issue is unclear." Specifically, in *Star Direct v. Dal Pra* the Wisconsin Supreme Court stated that "employers may not compel their existing employees to sign restrictive covenants without additional consideration." However, the *NBZ, Inc. v. Pilarski* court "implied" that if the employer had conditioned continued employment on execution of the non-compete, there might have been sufficient consideration. Because of the inherent contradictions between the *Star Direct* and *NBZ* cases, in addition to Wisconsin's reluctance to evaluate consideration, the Court of Appeals has requested the guidance of the Wisconsin Supreme Court.

Currently, most employers tend to err on the side of caution and provide some form of consideration when executing a "mid-employment" non-compete. A decision from the Wisconsin Supreme Court could change the playing field substantially. However, employers should continue to err on the side of caution until we have definitive guidance from the court.
