von Briesen
von Briesen & Roper, s.c. | Attorneys at Law

Radical Changes to Wisconsin Noncompete Law Proposed by Senate Bill

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Practice Area: Labor and Employment

On March 5, 2015, Senate Bill 69 was introduced in the Wisconsin Senate. This Bill would radically alter Wisconsin's noncompete law and change its status as arguably one of the most restrictive states for noncompetes. Senate Bill 69 proposed the following changes:

1. Continuing Employment: Continuing employment will constitute adequate consideration for restrictive covenants. Currently, the Wisconsin Supreme Court is considering whether to overturn a longstanding court decision that found continuing employment to be insufficient consideration for a noncompete agreement.
2. Blue Penciling Allowed: The courts would be able to "blue pencil" or revise overbroad agreements. This would be a drastic change from Wisconsin's current status as a "no blue pencil state".
3. Change in Terms and Conditions of Employment: A change in the terms and conditions of employment would be adequate consideration for noncompetes. Although common wisdom has been that granting additional employment benefits *could* constitute adequate consideration, Wisconsin courts have not yet definitively decided this issue.
4. Narrow Construction: Courts need not narrowly construe noncompete language. The current standard is that noncompetes must be narrowly construed to be as unrestrictive on the employee as possible.
5. Acceptable Time Limits: Senate Bill 69 would create presumptively acceptable and overbroad time periods. Currently, any Wisconsin noncompete must have a time period that is no more restrictive than reasonably necessary for the protection of a legitimate business interest. This Bill creates a presumption finding that any noncompete that lasts 6 months or less would be acceptable. Additionally, any noncompete greater than 2 years would be presumed overbroad. This 2-year presumption of overbreadth indicates that it is *possible* that a noncompete greater than 2 years might be acceptable under certain circumstances.
6. No Bond: Typically, parties subject to an injunction could require the party that requested the injunction to place a bond with the court. This no longer would be permitted. However, the enjoined party could request that "security" be placed with the court for any potential damages.
7. Attorneys' Fees: If a noncompete provides for an attorneys' fee award, the court must order such an award. If no attorneys' fee provision is included in the agreement, then Senate Bill 69 provides that the court should award fees to the prevailing party.
8. Ability to Make a Living: Previously, the court was required to consider whether the noncompete would prohibit an employee from being able to make a living in the employee's chosen profession. Senate Bill 69 instructs a court that it cannot make such a consideration.
9. No Public Policy Considerations: Under current law, courts are required to consider whether the noncompete violates public policy. Senate Bill 69 states that courts can no longer consider any public policy issues when enforcing a noncompete.

Currently, the Wisconsin Supreme Court is considering the issue of continuing employment as adequate consideration in *Runzheimer International, Ltd. v. Friedlen*. The Court heard oral arguments in October 2014, and we currently are awaiting a decision. However, it is possible that Senate Bill 69, or a similar amended version, could be signed into law before the *Runzheimer* decision is issued by the Wisconsin Supreme Court. Although the issues decided in *Runzheimer* might be applied to all noncompetes, Senate Bill 69 only would apply to those noncompetes executed after the effective date of the law.
