Wisconsin Non-Competes: Continued At-Will Employment is Adequate Consideration

May 05 2015

Practice Area: Labor and Employment

In *Runzheimer International, Ltd. v. Friedlen*, the Wisconsin Supreme Court ended decades of debate, deciding that continued employment is adequate consideration to support a non-compete entered into with an existing at will employee. In doing so, the Court clarified previous Wisconsin court decisions that created substantial debate over this topic.

After 20 years of employment, Runzheimer International required Friedlen to sign a restrictive covenant agreement, including a non-compete that prohibited Friedlen from providing restricted services to any of Runzheimer's competitors within a specific geographic area. Several years after Friedlen signed the agreement, Runzheimer terminated Friedlen's employment. Friedlen subsequently found employment with a competitor of Runzheimer, and Runzheimer sued to enforce the non-compete.

Friedlen and his new employer convinced the circuit court that Friedlen's continued employment alone was not sufficient consideration to support the non-compete. Friedlen did not receive a bonus, a raise, or any other discretionary benefit when signing the non-compete. Rather, Friedlen only received the opportunity to continue working for Runzheimer as an at-will employee. Because the circuit court found that continuing employment was not adequate consideration, the non-compete was unenforceable.

After Runzheimer appealed, the court of appeals deferred to the Wisconsin Supreme Court. On April 30, 2015, the Wisconsin Supreme Court issued its decision reversing the circuit court, finding that Runzheimer adequately supported the non-compete by "forbearance of its right to terminate an existing at will employee in exchange for the employee agreeing to a restrictive covenant." In other words, Runzheimer's agreement not to fire Friedlen if he signed the non-compete was adequate consideration for the restrictive covenant.

On appeal, Runzheimer argued that the promise of continued employment made by an employer to an existing at-will employee was sufficient consideration in exchange for the non-compete. In response, Friedlen argued that an at-will employee receives nothing new through such a promise – rather, the only difference was that the employee now was bound by a restrictive covenant. The Court agreed with Runzheimer, stating that Runzheimer "exchanged its right to fire Friedlen for Friedlen's promise not to compete . . . upon leaving the company." Simply put, Runzheimer and Friedlen were at a crossroads – either Runzheimer would fire Friedlen, or Friedlen would sign a non-compete and remain employed. This was a sufficient exchange to support the non-compete.

In its analysis, the Court noted that allowing employers to support non-competes with continuing employment "avoids a temptation for employers to circumvent the law." If initial employment, but not continuing employment, constituted sufficient consideration, employers simply would terminate existing at will employees and then rehire them the next day with a non-compete. In such a case, the employee still would retain legal protections through principles such as fraud in the inducement or good faith and fair dealing, relieving the employee from the non-compete in such a situation. However, by allowing continuing employment to support non-competes, employers do not need to "play games" by firing employees and rehiring them the next day, executing non-competes under the auspices of "initial employment".

After *Runzheimer*, we now know that continuing employment will constitute sufficient consideration for non-competes as to at will employees. It is important to note that this decision applies only to at-will employees. The Court did not hold that continuing employment is sufficient consideration for employees with a set term of employment. Such agreements should be read in their entirety, accounting for any early termination provisions and renewal clauses.
