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Labor and Employment Relations Alert

Are You Missing an Opportunity to Protect Your Competitive Advantage?

For nearly three decades, Illinois employers have been told that, in order to enforce a non-compete agreement, they must demonstrate a “legitimate business interest” in preventing employees from competing. Based on this requirement, some Illinois employers have chosen not to enforce, or forego completely, non-compete agreements, particularly with regard to sales employees or similar positions. The Illinois Appellate Court just gave Illinois employers a reason to re-think their opportunities for non-compete agreements.

In *Sunbelt Rentals v. Ehlers* (Ill. App. 4 Dist. 09/23/2009), the Fourth District of the Illinois Appellate Court rejected the “legitimate business interest” test, which generally required the former employer to establish that the non-compete agreement was drafted to protect confidential information or long-term customers. Instead, the Illinois Appellate Court held, “when presented with the issue of whether a [non-compete agreement] should be enforced, [the court] should evaluate only the time-and-territory restrictions contained therein.”

Applying its new standard, the Illinois Appellate Court enforced a one-year non-compete agreement prohibiting a former sales representative from working for any competitor within 50 miles of the former employer. Significantly, the former employer was not required to establish that the sales representative had access to confidential information or long-term customers. The Illinois Appellate Court reasoned, “[the sales representative] had two options if he thought the restrictive covenants in his employment contract with [the former employer] would cause him undue hardship. He could have (1) opted not to sign the employment agreement or (2) asked [the former employer] to eliminate or modify the terms of the restrictive covenants.”

Sunbelt represents a split in the Illinois Appellate Court that the Illinois Supreme Court will have to resolve. *Sunbelt* also represents a whole new class of employees, those without access to confidential information or long-term customers, who may be required to sign enforceable non-compete agreements. While Illinois employers wait to see if the Illinois Supreme Court addresses this issue, each employer should consider three important questions:

1. If the primary consideration in determining the enforceability of a non-compete agreement is limited to an assessment of the time and territory restrictions, are the time and territory restrictions in your non-compete agreements reasonable?
2. Should you require a broader range of employees, and in particular sales employees, to sign a non-compete agreement using the reasoning in *Sunbelt*?



3. If you are hiring an employee or recently hired an employee, did you check to determine if the employee has a non-compete agreement that previously might not have been enforceable but might be enforceable now?

If you do not know the answer to these or any other non-compete questions, please contact one of the authors of this alert, or any member of Michael Best's Trade Secret Protection and Non-Competition Team, which frequently counsels employers regarding the drafting and enforceability of non-compete agreements and the protection of confidential information and trade secrets.

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