

# One Minute Memo<sup>®</sup>



## Recent Illinois Employee Consideration Case May Invalidate Certain Restrictive Covenants

Restrictive covenants in an employment agreement are not enforceable unless the restrictions are supported by adequate consideration. In the past, signing the employment agreement at the start of one's employment was sufficient consideration for enforcement of the restrictive covenants. The First District Appellate Court of Illinois, however, published an opinion last week holding that there "must be at least two years or more of continued employment to constitute adequate consideration in support of a restrictive covenant." *Fifield v. Premier Dealer Services, Inc., No. 1-12-0327 (Ill. App., 1st Dist., 6/24/13)*. The *Fifield* decision is unique in that no reported decision from any other state, or from Illinois for that matter, is in accord. For a more thorough discussion and analysis of the *Fifield* decision, please read Seyfarth Senior Counsel Paul Freehling's blog post at [www.tradesecretslaw.com](http://www.tradesecretslaw.com).

Under *Fifield*, assuming that the restrictive covenants are unsupported by consideration other than the offer of employment (*i.e.*, in exchange for a bonus, use of trade secrets, etc.), an employer may be unable to enforce the covenants as against any particular employee who is terminated less than two years after coming to work. *Indeed, an employee apparently could nullify the restrictions unilaterally simply by resigning earlier than the second anniversary of the agreement.*

Seyfarth is monitoring the Illinois Supreme Court and First District Appellate Court in order to see if the *Fifield* decision is appealed. We will continue to update our clients on the progression of *Fifield* through the Illinois judicial system and any other Illinois restrictive covenant cases that follow or reject the *Fifield* decision. In the interim, we recommend that, especially in Illinois, employers tender to employees something of value besides just the offer of new or continued employment contemporaneous with the execution of restrictive covenants. Moreover, the agreement containing those covenants should identify the additional consideration and state expressly that the employee acknowledges the receipt and sufficiency of the additional consideration.

Please contact Seyfarth's Trade Secrets, Restrictive Covenants and Corporate Espionage Group for more information.

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