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Continued Employment May Constitute Sufficient Consideration for Noncompete Agreements in Connecticut, but Uncertainty Remains

Article By:

Deborah DeHart Cannavino

Lori A. Medley

The Connecticut Supreme Court recently held that continued employment *may* constitute sufficient consideration for noncompete agreements under Connecticut law, but left unclear the parameters of that holding.

In *Dur-A-Flex, Inc. v. Dy*, Dur-A-Flex, a commercial flooring company, hired Samet Dy as a research chemist in 2004. Years later, in 2011, Dur-A-Flex required Dy to execute a noncompete agreement as a condition of continued employment. The noncompete agreement prohibited Dy from performing any services for a competitor for twenty-four months after his employment terminated. In 2013, Dy resigned and Dur-A-Flex sought to enforce the noncompete. The trial court held that the noncompete was unenforceable because continued employment can *never* constitute sufficient consideration for a noncompete agreement.

On appeal, the case was transferred from the appellate division to the Connecticut Supreme Court. In a July 2, 2024 decision, the Supreme Court reversed the trial court, which had relied on a 2014 court of appeals decision entitled *Thoma v. Oxford Performance Materials, Inc.*, to hold that "a party giving nothing more than the status quo of continuing employment … offers no consideration [in] exchange for his promise and the promise is, therefore, unenforceable." The Supreme Court agreed with Dur-A-Flex that *Thoma* was distinguishable and that a 1934 Connecticut Supreme Court decision called *Roessler v. Burwell* was controlling. The Court held that under *Roessler,* "a promise of indefinite, continued employment for an at-will employee in exchange for the employee's promise not to compete constitutes adequate consideration to form an enforceable agreement."

Additionally, the Court stated that *Thoma* was factually distinguishable. In *Thoma,* the employee signed two agreements, each containing a noncompete. Whereas the first agreement imposed conditions on the employer's right to terminate the employee's employment (thereby altering the employee's status as an at-will employee), the second agreement stated that the employer could terminate the employee at any time without cause or notice. When the employer terminated the employee without notice, cause or compensation, the trial court ruled that the employer breached the first agreement and the second was unenforceable because consideration did not support it.

The *Thoma* appellate court affirmed, concluding that the second agreement did not require the employer to do anything other than what it was already obligated to provide and thus lacked consideration.

By contrast, in *Dur-A-Flex*, the Court explained, Dy was an at-will employee and Dur-A-Flex's "forbearance of its right to terminate his employment could be valid consideration if it altered the at-will employment status."

The Court found that it could not determine, as a matter of law, that Dur-A-Flex gave sufficient consideration to render the noncompete enforceable. Unlike *Roessler*, where the employer promised to employ the employee indefinitely in exchange for his promise not to compete, Dur-A-Flex did not explicitly promise Dy continued employment for any particular period. The Court remanded the matter back to the trial court to determine whether there was sufficient consideration for the noncompete agreement.

Although the Connecticut Supreme Court in *Dur-A-Flex* held that, in certain circumstances, continued employment of an at-will employee could be sufficient consideration for a noncompete or other restrictive covenant if the employer modifies the at-will status of the employee, it did not provide specific guidance for Connecticut employers regarding what would qualify as sufficient consideration. Given this uncertainty, employers who do not want to alter an employee's at-will status may wish to take a more conservative approach by either having the employee sign a noncompete or restrictive covenant prior to the commencement of employment or, for a post-hire noncompete and other restrictive covenant, including some form of additional compensation as consideration for the restriction.

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