

# Shedding Some Light on Consideration Needed to Enforce Restrictive Covenants in Illinois

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Restrictive covenants in an employment agreement can be an effective way for employers to protect their valuable assets, such as their confidential information and longstanding customer relationships, from their departing employees' unfair competition. The enforceability of restrictive covenants in an employment agreement depends upon key factors, as well as the facts and circumstances of each case.

One of those factors is whether the agreement is supported by adequate consideration to enforce the *post-employment restrictive covenants*. In other words, has the employee received something of sufficient value in exchange for giving up rights and opportunities after employment, such as the ability to use the former employer's confidential information or to solicit its customers and employees? In its most recent case addressing postemployment restrictive courts, ***Reliable Fire Equip. Co. v. Arredondo***, the ***Illinois Supreme Court*** noted that "a restrictive covenant will be upheld if it contains a reasonable restraint and the agreement is supported by consideration."

What do Illinois courts deem to be adequate consideration for post-employment restrictive covenants? Unfortunately for employers, Illinois courts are divided on that question.

The First District of Illinois Appellate Court addressed this issue in *Fifield v. Premier Dealer Servs.* The Fifield court rejected the notion that employment itself could serve as consideration for a restrictive covenant and articulated a 'bright line' rule that "there must be at least two years or more of continued employment to constitute adequate consideration in support of a restrictive covenant." The Fifield court held that there was inadequate consideration where, regardless of whether the employee signs the restrictive covenant before or during the employee's employment, the employee's employment lasted a mere three months.

Following the Fifield decision, federal district courts in Illinois split on whether a bright line rule should be followed in determining whether adequate consideration exists. In *Montel Aetnastak, Inc. v. Miessen*, Judge Ruben Castillo rejected Fifield's bright line rule and instead employed a "fact-specific approach" in holding that adequate consideration existed where the plaintiff voluntarily resigned after remaining employed for fifteen months. On the other hand, Former Chief Judge

Holderman adhered to the two year bright line rule in *Fifield* and held that the restrictive covenants were unenforceable against the defendants who were employed for fewer than two years in *Instant Tech., LLC v. Defazio*.

A recent decision in the Northern District of Illinois has, however, tipped the adequate consideration scales toward a fact-specific, totality-of-the-circumstances approach, rather than a bright line rule requiring that an employee be employed for at least two years in order to have adequate consideration for post-employment restrictive covenants. In *Bankers Life & Cas. Co. v. Miller*, Bankers Life sued seven departing employees alleging, among other things, that they breached their restrictive covenants. Judge Manish Shah emphasized that “Illinois appellate cases . . . suggest that two years of continued employment are sufficient to support a restrictive covenant; but they do not hold that two years are necessary” and thus rejected *Fifield*’s bright line rule while predicting that the Illinois Supreme Court would do the same. Judge Shah held that “the covenants do not fail for inadequate consideration” based solely on the *Fifield* bright line rule requirement.

Employers can use the *Bankers Life* decision to argue that adequate consideration exists to support restrictive covenants based upon a case-by-case analysis rather than be limited by a two year bright line rule. Yet, the consideration needed to enforce restrictive covenants under Illinois law remains an unsettled and evolving question. As a result, employers should review their restrictive covenants to provide for additional consideration, where necessary, and make other strategic decisions that enhance their chances of deterring wrongful conduct by departing employees and enforcing their restrictive covenants, if necessary.

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