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Wisconsin Non-Compete Waters Just Got Muddier

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On April 30, 2015, the Wisconsin Supreme Court issued its long-awaited decision in Runzheimer Int'l, Ltd. v. Friedlen, settling a dispute in Wisconsin over whether continued employment alone was sufficient to bind an employee to a non-compete agreement. The case involved an important, if nuanced, distinction between (a) whether there is a legal "agreement" in the first place and (b) whether that legal agreement is enforceable. If there is no legal agreement, then there is nothing to enforce. If there is a legal agreement, the question becomes whether the restrictions themselves are enforceable (based on their reasonableness,etc.). The former question was addressed in Runzheimer.

Wisconsin always has found the initial agreement to hire an employee as sufficient consideration to create legal agreements; but Runzheimer answered the question of whether an existing employee could be required to sign a non-compete agreement without being given anyadditional consideration. (Runzheimer did not involve whether the agreement's restrictions were themselves enforceable.)

The Court held that no additional consideration is required. The fact that an employer foregoes its right to terminate an at-will employee immediately is, in and of itself, the only consideration necessary to create a contract containing post-employment restrictions. The Court was unconcerned by the possibility that unscrupulous employers might force an employee to sign a non-compete and then fire the employee the next day and seek to enforce the non-compete. In the view of the Court, in such a circumstance the employee would have other means of contesting enforcement, such as claiming that he was fraudulently induced to sign the agreement, or that the employer acted in bad faith. If the decision had ended here, its effect would have been fairly clear. But it did not end here.

One member of the Court, in a concurring opinion, stated that the Court's decision could be understood only if the employer's promise not to immediately fire the employee constituted an implied promise not to fire the employee without cause for some (undetermined) period of time. This concurrence surely will create additional litigation down the road.

Wisconsin non-compete law has always been an outlier of sorts, and after Runzheimer it will continue to be so. In the first instance, employers now need to make sure they instruct incumbent employees whom they want to sign a non-compete that they will be fired immediately unless they agree to the newly imposed non-compete (and, presumably, must then actually fire them if they refuse to agree). And the concurring opinion might create litigation over "wrongful discharge" of any employee who (1) was required to sign a non-compete after employment had commenced and then (2) was fired

“without cause” relatively soon thereafter (how long before they lose the “cause” protection is anybody’s guess).

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