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Wisconsin Supreme Court Rules Continued Employment is Lawful Consideration to Support a Restrictive Covenant

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Wisconsin has firmly joined the majority of jurisdictions in the United States that hold that continued employment constitutes lawful consideration sufficient to enforce a restrictive covenant with a current at-will employee. The Wisconsin Supreme Court's decision in *Runzheimer International, Ltd. v. Friedlen and Corporate Reimbursement Services, Inc.*, 2015 WI 45 (Wis. 2015), is a victory for Wisconsin employers and marks the end of years of debate on this issue.

The Facts and Procedural History

In 2009, Runzheimer International, Ltd. asked all of its employees, including the individual defendant in this case, to sign a restrictive covenant containing non-compete and non-solicitation obligations. The company gave the defendant two weeks to review and sign the covenant, or face termination of his employment. The defendant signed the covenant and worked for the company for 29 more months until his employment was terminated on November 16, 2011.

Following his discharge, the defendant began working for one of Runzheimer's competitors, Corporate Reimbursement Services, Inc. ("CRS"). After learning of the defendant's new position, which Runzheimer believed violated his restrictive covenant, the company sent a letter to him demanding his compliance with the covenant. The defendant ignored the letter because he believed the covenant was unenforceable. Runzheimer sued the defendant and his new employer, alleging the defendant breached the restrictive covenant and CRS tortiously interfered with the covenant. The circuit court granted the defendant's and CRS's motion for summary judgment, finding a promise of continued employment could not constitute consideration for the covenant. Runzheimer appealed, and the court of appeals certified the case to the Wisconsin Supreme Court, asking it to decide whether consideration in addition to continued employment was required to support a restrictive covenant entered into by an existing at-will employee.

The Wisconsin Supreme Court's Analysis and Ruling

The court began its analysis by clarifying the scope of existing case law regarding lawful consideration to support a restrictive covenant with a current at-will employee.

In *Star Direct v. Dal Pra*, 2009 WI 76 (Wis. 2009), the Wisconsin Supreme Court ruled that employers may not compel their existing employees to sign restrictive covenants without additional consideration. However, the court did not explain what would constitute the requisite additional consideration. The court also explained that in *NBZ, Inc. v. Pilarski*, 185 Wis. 2d 827, 520 N.W.2d 93 (Wis. Ct. App. 1994), the court of appeals' ruling was limited to a determination that a restrictive covenant between an employer and an existing at-will employee lacks consideration when the employer neither conditions the employee's continued employment on signing the agreement, nor promises to do anything else in exchange for signing the agreement. In other words, *NBZ* did not reach a determination as to whether lawful consideration exists if an employer expressly conditions the existing at-will employee's continued employment on his or her signing a restrictive covenant. The court explained that, based on this precedent, Wisconsin law failed to adequately address whether an employer's withholding its right to terminate an existing at-will employee in exchange for the employee's agreement to sign covenant constitutes lawful consideration.

In providing the clarity many Wisconsin employers have been waiting for, the Wisconsin Supreme Court ruled that Wisconsin will align with the majority of jurisdictions that consider continued at-will employment to be lawful consideration for a non-compete covenant. The court recognized employers are within their right to respond to changing economic conditions and reduce the risk that employees will unfairly take business away by requiring current at-will employees to sign restrictive covenants. The court also recognized that if additional consideration beyond continued employment was required, employers could discharge an employee and then re-hire him or her with a non-compete covenant.

In addressing how much continued employment was enough, the court stated it was unnecessary to determine whether Runzheimer's promise not to discharge the defendant was for an indeterminate amount of time. The length of a promise's duration relates to the adequacy of consideration, not the existence of lawful consideration. The court explained: "[l]awful consideration existed, as both parties agreed to give up a legal right. The inquiry ends there."

In response to the former employee's argument that Runzheimer could have terminated his employment shortly after signing the covenant, the court found he was not without recourse. The court stated that such conduct would violate the spirit of the agreement: "Although theoretically, an employer could terminate an employee's employment shortly after having the employee sign a restrictive covenant, the employee would then be protected by other contract formation principles such as fraudulent inducement or good faith and fair dealing, so the restrictive covenant could not be enforced."

Implications for Wisconsin Employers

Wisconsin employers now have the reassurance that continued at-will employment constitutes lawful consideration necessary to support a restrictive covenant. However, employers relying on continued employment as consideration for a restrictive covenant need to consider terminating an employee who refuses to sign the covenant (and should communicate the consequences of failing to sign the covenant, preferably in writing). Failing to consistently terminate employees who refuse to sign a restrictive covenant could undermine the enforceability of the covenant by calling into question the validity of continued employment as consideration. If employees who refuse to sign are permitted to maintain their employment, an argument may exist that continued employment for others who do sign is illusory consideration. Differential treatment of similarly-situated employees regarding restrictive covenants could give rise to an employment discrimination claim. If an employer is not prepared to discharge employees who refuse to sign restrictive covenants, they should consider offering additional consideration to incentivize execution.

Finally, employers should not require employees to execute restrictive covenants in exchange for continued employment if they do not intend to retain an employee for a reasonable period of time. Although the Wisconsin Supreme Court did not specify this in holding continued employment is lawful consideration, it made clear that the employer's promise not to terminate must not be fraudulent or in bad faith. (In her concurring opinion, Justice Abrahamson interprets the majority's decision as holding that, in effect, Runzheimer implicitly promised not to terminate the defendant's employment for a reasonable period of time.) What constitutes a reasonable period of time is necessarily fact-specific, dependent on various factors relating to, among other things, the employer's business needs.