

Illinois Supreme Court Shifts the Playing Field for Non-Compete Agreements

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For 36 years, agreements in which Illinois employees agreed to refrain from competitive activity following termination of employment have been judged under a standard requiring the employer to prove that it had a legitimate business interest for restricting post-employment competition. Two Illinois appellate decisions in 2009-2010 rejected this requirement, concluding that it had been invented by the appellate courts and never endorsed by the Illinois Supreme Court. On December 1, 2011, in [*Reliance Fire Equipment Co. v. Arredondo*, No. 11871](#), the Illinois Supreme Court put that idea to rest, holding that it has been a part of Illinois law for over a century. This was the first Illinois Supreme Court decision considering what business interests could justify a non-compete agreement since the early 1970s. This issue dominated litigation over these agreements throughout that period.

It is now clear: to enforce an Illinois post-employment restriction on competition, the employer must show (1) the restriction is no greater than required to protect a legitimate business interest, (2) the restriction does not impose an undue hardship on the employee and (3) that the restriction does not harm the public interest.

This decision's impact will be far-reaching for other reasons. The court rejected the idea that only the protection of confidential information and near-permanent customer relationships could qualify as a "legitimate business interest" that can justify post-employment competitive restrictions—without indicating what other interests might be appropriate. The decision rejected the longstanding approach to evaluating whether the employer has such a legitimate business interest. Replacing the painstaking analysis of specific factors, an approach that has governed this field for decades, is a "totality of the circumstances" test.

The one sure thing is that the already considerable uncertainty about whether any non-compete will be enforced under Illinois law just increased exponentially. No one knows for sure how the "totality of the circumstances" approach will play out in actual cases. While the court did not reject all of the case law developed on this issue in the past 36 years, it has devalued that precedent. Now the decisions should be viewed as "nonconclusive examples" of what is permitted or prohibited, as distinguished from "inflexible rules." Thus, all prior appellate court cases are, at best, limited to their specific facts. Which ones will ultimately be found to have been wrongly decided is impossible to know at this point.

The court did suggest that it will still require a showing that, to justify a non-compete agreement, a customer relationship must qualify as “near-permanent”—this requirement has placed strict limits on enforcement of Illinois non-compete agreements. The court said that more than one business interest could be considered in deciding whether a particular restriction is justified. By expressing strong criticism of the heavy focus on the “legitimate business interest” element of the test for validity of a non-compete agreement, the court may also have been implying that restrictions will need to be limited to what is actually necessary to protect the employer’s legitimate business interest and that it may look with a more critical eye at whether the restriction imposes an undue hardship on the employee.

Practical Implications for Businesses Operating in Illinois

This is a time when a careful review of non-compete agreements — their scope, their language and the business background — would be helpful. Different strategies to deal with this development in the law may be considered in consultation with your Hinshaw & Culbertson LLP attorney and acted on promptly. You may be in a position to take advantage of the implications of some of the observations contained in the decision, or you may be in need for a tightening up of provisions to increase your ability to enforce them.

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