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Continued at-will employment is sufficient quid pro quo for noncompetition agreement

By Lawrence Peikes

A sharply divided Ohio Supreme Court has held that continued at-will employment is sufficient consideration to support enforcement of a noncompetition agreement.

Lee Columber was hired by Akron, Ohio-based Lake Land Employment Group in 1988. In September 1991, Lake Land presented him with a noncompetition agreement providing that for three years after the termination of his employment, Columber would not engage in any business that competed with Lake Land within a 50-mile radius of Akron.

After reading the agreement, Columber signed it. Lake Land did not increase Columber's salary or benefits in connection with his signing of the agreement, nor did the status of his employment change.

Following his termination 10 years later, Columber formed a corporation engaging in business similar to Lake Land's. Lake Land sued to enforce the noncompetition agreement.

The trial court granted summary judgment for Columber, holding that he was given no consideration for signing the noncompetition agreement, and, as a result, the agreement violated a basic tenet of contract law.

Lake Land appealed, but to no avail. Although the appellate court affirmed the trial court's decision, it recognized disagreement between its decision and those of two other Ohio courts of appeals. Accordingly, it certified a conflict to the Ohio Supreme Court.

The conflict surrounded whether continued at-will employment, without additional incentive, was sufficient consideration to support a covenant-not-to-compete. The state supreme court held that it was.

Noting that courts generally view noncompetition agreements with skepticism, the court acknowledged that it had long recognized the validity of noncompetition agreements reasonably limited in their geographic scope and duration.

Courts across the country are split over the specific issue, the court observed. Those holding that continued at-will employment is not sufficient consideration in exchange for a noncompetition agreement focus on a current employee's lack of bargaining power and exposure to coercion.

Decisions to the contrary focus on facts such as that an employee who refused to sign would be discharged, employees were employed for a substantial period of time after signing the agreement, or employees received additional training, compensation or confidential information after executing the contract.

Refuting the notion that an employee had a future right to work under the past terms of employment, the court turned its attention to the contractual nature of at-will employment. The employee agrees to work under the employer's direction and control, and, in exchange, the employer agrees to pay the employee at a determined rate. Either party, for any reason and at any time, can terminate this relationship legally. Accordingly, the mutual, continuing promises to employ and to work for the employer each served as valid consideration for the other.

Thus, the court reasoned that, in an at-will relationship, either the employer or the employee could modify the terms of employment at any time. Essentially, the presentation of a noncompetition agreement to an employee is a proposal by the employer to renegotiate the terms of the at-will relationship. By accepting the agreement, the employee essentially consents to continued employment on the new terms. Consideration exists just as it did before: the employer promises to employ the employee at an agreed-upon rate, and the employee agrees to work under the agreed-upon conditions. Either party retains the ability to terminate the relationship at any time.

The court noted that both Columber and Lake Land had the right to terminate their employment relationship when Columber was presented with the noncompetition agreement. Because neither did so, the agreement was not void for lack of consideration. Recognizing that no

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determination had been made regarding the reasonableness of the noncompetition agreement, the court reversed the summary dismissal and sent the case back to the trial court for further proceedings.

The dissenters argued that Columber's continued employment could not be sufficient consideration for his assent to the agreement, because he had not been promised anything other than that which he already had. Moreover, they observed, under the majority's holding, the continued employment of an employee who has assented to a noncompetition agreement "need not last longer than the ink is dry upon his signature."

Lake Land Employment Group of Akron, Ohio v. Columber, 101 Ohio St.3d 242, 804 N.E.2d 27 (March 10, 2004)

Professional Pointer: Employers in Ohio, and jurisdictions with similar holdings, need not offer their at-will employees anything more than continued employment as consideration for their signing of a noncompetition agreement. But the terms of the agreement must meet often strict standards to ensure their enforceability.

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