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Labor, Employment & Immigration Flash

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Wisconsin non-compete revolution: Proposed legislation would provide employers greater certainty in enforcing restrictive covenant agreements

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On March 5, 2015, Senator Paul Farrow of Waukesha County introduced 2015 Senate Bill 69: legislation that would repeal *and recreate* Wisconsin Statute 103.465, the law governing restrictive covenant agreements in the state. The proposed law would provide employers concrete guidance on how to draft enforceable agreements. It would also allow courts to modify unreasonable restrictions to make them reasonable and then enforce the revised agreement. These changes, as well as others outlined below, will make enforcement of restrictive covenant agreements more likely—an effect that will generally benefit employers.

Summary of the proposed law

Restrictive covenants executed between employees or agents and their employers or principals on or after enactment of the proposed law will be governed by the new provisions. The bill's proposed changes would overturn prior precedent and provide clarification and guidance where there was previously uncertainty. Below are a few highlights.

Certain agreements are *not* restrictive covenants. The proposed law excludes the following agreements from the definition of a "restrictive covenant":

1. confidentiality agreements restricting employees from sharing confidential information that is not valuable to a competitor; and
2. employee non-solicitation agreements restricting solicitation of certain employees who:
    a. do not have substantial relationships with existing customers, patients or clients;
    b. do not have access to confidential information; and
    c. have not received special, unique or extraordinary training.

Modification. One of the most helpful provisions of the bill would permit courts to modify or "blue-pencil" restrictive covenants to make them reasonable. Under the current legal framework, a restrictive covenant that is overbroad is unenforceable and leaves the employer with no protection at all. This provision would allow courts to revise and enforce agreements that previously would have been found unenforceable.

Consideration. Another helpful provision of the bill adds examples of sufficient consideration to support an agreement. The sufficient consideration issue has been a topic that has remained largely unaddressed by courts and has led to uncertainty for employers seeking to support agreements with continued employment or nonmonetary benefits. Under the bill, continued employment, by itself, will be considered sufficient consideration if continued employment is contingent on the employee signing the agreement.

The bill also states that a court must find that sufficient consideration exists if the agreement:

1. is signed at the beginning or near the beginning of the employment relationship and employment is contingent on signing the agreement;
2. provides the employee consideration of any value acceptable to an employee that is above and beyond that due to the employee under the terms of some other agreement or promise; or
3. offers the employee monetary consideration, including a bonus, additional paid time off, access to a bonus or incentive program or pool, or garden leave (more on this below).

"Reasonableness" defined. The bill sets forth the factors a court must consider when determining whether a restraint is reasonable, including rebuttable presumptions that a court must apply. For example, a covenant lasting six months or less will be presumed reasonable, whereas a covenant that lasts more than two years will be presumed unreasonable. This is not to say that a covenant that is longer than two years will not be enforced; rather, employers will be required to show why the restriction is reasonable.

Previously, courts would evaluate the reasonableness of a restriction by considering the impact it had on the employee. The proposed law would prohibit courts from considering individualized economic or other hardship on the employee, unless the employee can show that exceptional circumstances exist.

Garden leaves. Garden leave is a concept currently not addressed in the law. The bill defines a "Garden Leave" to be a paid leave provided to an employee from the date the employee provides notice of resignation or the employer provides notice of termination and the date the employment relationship ends. Employers may therefore place employees on a paid leave of absence, during which time the employer may prevent the employee from competing with his or her employer, soliciting customers or employees of the employer, and from disclosing confidential information. Garden leaves are presumed to be reasonable restraints.

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