



IT'S THE LAW



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**BROUGHT TO YOU BY:
BERGLUND & NIEW, P.C.**

**ATTORNEYS & COUNSELORS
900 JORIE BOULEVARD
SUITE 122
OAK BROOK, ILLINOIS 60523
(630) 990-0234
WWW.BERGLUNDNIEW.COM
BERGLUNDNIEW@AOL.COM**

STANLEY E. NIEW
JOSEPH P. BERGLUND
G. RYAN LISKA
KENNETH M. MASTNY

SERVING THE CONSTRUCTION INDUSTRY
IN EMPLOYMENT AND LABOR MATTERS AND CONSTRUCTION
CONTRACT CLAIMS

Illinois Supreme Court Permits Arbitration Agreements With Employees

In Melena v. Anheuser Busch, the Illinois Supreme Court stated that an employer could require an employee to arbitrate employment disputes rather than having an employee sue in court. The court held "continued employment is sufficient consideration for enforcement of employment agreements." When deciding to revise a handbook to include binding arbitration for unorganized employees, every employer must also consider federal court decisions since the federal courts have been active in this area of the law. In Circuit City v. Adams, the US Supreme Court cleared the way for enforcement of Title VII claims, Americans with

Disability claims, and Age Discrimination claims through arbitration agreements. Since this was a 5 to 4 decision, many of the Federal Circuit Court of Appeals provided limitations on the arbitration process. If an employer wishes to implement a mandatory arbitration process, the process should contain the following elements: 1) the arbitration policy must be in writing. The policy should include a dispute resolution procedure which requires the employee to formalize the complaint in writing describing the problem, indication of who in management was complained to, what the management person said, why the complainant disagrees, and what the complainant believes should be done. The policy should then require an employer's response to crystalize the problem. 2) The arbitration policy should be drafted in the handbook, or if there isn't a handbook, there should be a separate written acknowledgment that each employee has received, read and understood the policy. It would also be prudent to include a copy of a new policy in the employee's paycheck and separately mail a copy to the employee's home. 3) The arbitration clause should state clearly what disputes and claims are subject to arbitration and should contain a mutual promise to be bound by the results of the arbitrator's decision. 4) Use an independent Arbitration agency - the procedure must be fair to pass court scrutiny. Use a recognized independent organization such as American Arbitration Association or JAMS/Endispute. 5) The relief and damages must be the same as are available in courts- the arbitration clause cannot eliminate statutory remedies such as compensatory damages, back-pay, front-pay, punitive damages, and attorney's fees. Hence, it is best to include a statement in the policy that the arbitrator can award all damages available under any statutory scheme.

This Newsletter is not intended as legal advice since each situation depends specifically on the facts presented. Persons reading this Newsletter should seek competent legal advice with regard to the subjects contained herein before making any employment or other decisions.

6) The award should be in writing - a written decision indicates the Arbitrator understood and considered the employee's claim for closing a reviewing court to vacate the award because an arbitrator disregarded the law. 7) Do not limit access to enforcement agencies - two federal courts have ruled that enforcement agencies such as the EEOC and the NLRB have an independent right to conduct proceedings which cannot be limited by arbitration agreements. Employers may have a concern that the employee gets two bites at the apple - one in arbitration and one before the federal agency. The concern may be unwarranted since two federal circuit courts held the EEOC may not seek purely monetary relief for an employee who is required to arbitrate those claims with his employer. EEOC v. Kidder Peabody (2nd Cir. 1998); EEOC v. Waffle House (4th Cir. 1999). 8) Employer must pay for the Arbitration - Many courts found that requiring employees to pay large arbitration fees invalidates the arbitration clause. It is best to limit the employee's share of the amount of arbitration equal to or less than a fee to bring a federal lawsuit.

Conclusion

Arbitrations are generally less expensive than litigation for employers especially in view of the limited discovery. On the other hand, the up front filing fees for the employer can be several thousand dollars which must be weighed against the total cost of litigation. Keep in mind that an Arbitrator's award will be more difficult to overturn than a judge's decision. If you would like to consider such an arbitration agreement, call Stanley Niew. (Arbitration agreements for unionized employees must be negotiated with the appropriate union.)

Duty of Loyalty Owed by Officers and Directors of Corporations in Taking Corporate Opportunities

Under Illinois law, directors and officers of a corporation owe the corporation a duty of care and a duty of loyalty. The duty of loyalty prevents directors and officers from conflicts of interest, competing with the corporation, and usurping of corporate opportunities. The "corporate opportunity" doctrine prohibits corporate directors, officers, and in some cases even employees, from taking personal advantage of business opportunities in which the corporation has an interest.

Illinois courts are extremely strict when it comes to the usurpation of corporate opportunities. The seminal case on the issue is the Illinois Supreme Court case of Kerrigan v. Unity Savings Association. In Kerrigan, the Court held that a director has the duty to tender an opportunity to the corporation before the director can personally take advantage of such opportunity. Although this may not seem to imply a strict interpretation of this doctrine, the facts of the case suggest otherwise. The Kerrigan defendants (5 individuals, 3 of whom were directors) worked for a savings and loan association. The defendants then organized an agency to sell insurance to mortgage customers of the savings and loan. The court held that the opportunity to form the insurance company should have been tendered to the savings and loan before the defendants formed the company. The defendants argued that it would have been illegal for the savings and loan to engage in the insurance business, but the court determined that there could be a way that the savings and loan could have benefitted from the opportunity, such as by creating a subsidiary to handle the insurance business. Although Kerrigan involved directors of the corporation, Illinois courts have been equally hard on officers.

The court will look at multiple factors to determine whether a corporate officer or director has taken a corporate opportunity for his own personal benefit. These factors are: (1) the manner in which the offer was communicated to the individual; (2) the good faith of the individual; (3) whether corporate assets were used to acquire the opportunity; (4) the financial ability of the corporation to acquire the opportunity; (5) the amount of disclosure made to the corporation by the individual; (6) the action taken by the corporation as a result of the disclosure; and (7) the interests or needs of the corporation in regard to the opportunity. This is not an all inclusive list of factors, nor is any single factor determinative of the issue. As can be seen from the Kerrigan decision, if there is even a chance that the corporation may be interested in the opportunity, the officer/director should tender such an opportunity to the corporation prior to taking advantage of it for his own personal gain.

The corporate opportunity doctrine in Illinois has even extended in certain cases to employees who are not directors or officers. An

employee can fall within this doctrine if the employee takes a business opportunity for his own benefit when the opportunity falls within the scope of the employee's agency. In such a situation, the employee would most likely be required to tender such opportunity to the corporation before taking advantage of the opportunity for his or her own personal benefit.

Keep in mind that under the corporate opportunity doctrine, Illinois courts have held that opportunities should be tendered to the corporation even in cases where the individual believed it was legally and/or financially impossible for the corporation to take advantage of the opportunity. In addition, these issues extend beyond contractual agreements, such as covenants not to compete. Damages for the usurpation of a corporate opportunity can include returning the benefit of the opportunity to the corporation, as well as the forfeiture of any salary earned by the officer/director/employee while the corporate opportunity was being usurped.

Intermittent Leave Under the FMLA

Under the Family and Medical Leave Act, an employee can obtain up to 12 weeks of leave in a year as a result of a serious health condition. Employees with chronic serious conditions or that are required to take intermittent leave as a result of such a condition under the FMLA can pose unique problems. Employers should focus on the regulations and follow FMLA requirements in order to protect themselves in intermittent leave situations. The regulations define "intermittent leave" as "FMLA leave taken in separate blocks of time due to a single qualifying reason."

Intermittent FMLA leave would result, for example, if an employee has a chronic, serious condition that could incapacitate him or require treatment and cause the employee to be unable to work for short periods of time. Some examples of intermittent leave are: an occasional basis for medical appointments, such as chemotherapy treatments; prenatal examinations or severe morning sickness for a pregnant employee; a spastic colon that is a chronic lifetime disease periodically requiring two to three days of leave; or a major depressive disorder allowing an employee to use FMLA time for less than a complete shift.

Under the FMLA, employers can require employees to substantiate requests for leave with a medical certification of the serious health condition, and employers can also require re-certification on a reasonable basis. Generally, an employer can demand medical re-certification every thirty (30) days for a chronic condition. However, if the employee's certification reports a need for intermittent leave and the minimum period specified for such leave is longer than thirty (30) days, the employer ordinarily cannot demand re-certification until the minimum period has passed.

As an employer, you are entitled to know from the certification: 1) how long the physician believes the need for intermittent leave will continue, 2) the expected frequency of the condition, and 3) the expected duration of the "episodes" resulting from the chronic condition. If a physician makes a certification that is unclear or if an employer is seeking a re-certification, the employer should follow the FMLA requirements for obtaining the information from the employee.

The regulation requires that the employer 1) provide written notice to the employee of the requirement for medical certification and include the employee's rights under the FMLA, 2) give the employee fifteen (15) days to respond to the request and 3) warn the employee of the consequences of not complying with the request. Failure of the employer to give written notice would prohibit the employer from taking action against an employee for failure to comply with the request. Failure of the employee to respond within a reasonable time under the circumstances allows the employer to delay the employee's continuation of FMLA leave. If the employee never produces the certification, the leave is not FMLA leave. After such a request, the employer is in a much better position to determine whether the employee's leave is covered under the FMLA.

Should Employers Require Employees To Sign Non-Compete Agreements?

I. Introduction

How many times have you heard the phrase “It’s hard to find good help”? Seemingly, many employers find this statement to be increasingly more accurate. Since your competitors probably feel the same way, it is common for employers to pry management employees away from their competitors by promising more money, profit sharing, more responsibility, etc. In the event a competitor is successful in luring away a management employee, what can you do to protect client relations and proprietary and confidential information the employee will taking to your competitor? This article will provide an overview of restrictive covenants and whether such agreements are enforceable.

II. Restrictive covenants are enforceable

The most common type of restrictive covenants are non-competition agreements and customer non-solicitation agreements. Generally speaking, non-compete agreements try to foreclose the former employee and/or his new employer from conducting business in a geographical area with entities that never had any business relationship with the former employee. On the other hand, non-solicitation agreements basically are activity restraints. These protect the employer’s interest in only those customers that the former employee had contact. For purposes of this article, both non-competition agreements and non-solicitation agreements will be referred to as restrictive covenants.

Restrictive Covenants are designed to protect confidential information and permanent customer relationships against misappropriation and solicitation. Generally, restrictive covenants are enforceable if they are part of a valid contract and are necessary to protect the employer’s legitimate business interest and are reasonable in terms of duration, territory and activity. Restrictive covenants can be part of a employment contract, employee handbook, or a severance agreement.

Since Illinois Courts consider these agreements to be partial restraints in trade, restrictive covenants will not be enforceable if the agreements lack specificity detailing the duration, geographic area, and prohibited activities. For instance, a court is not likely to uphold a

geographical restriction if former employee never established a relationship with the former employer’s customers in that given area or if the employer does not do business in area. Likewise, a restrictive covenant that lasts in excess of three years may not be enforceable. Furthermore, Illinois courts have made it clear that a restrictive covenant consummated for the sole purpose of limiting competition will not be enforced. It is therefore imperative that the purpose of the restrictive covenant be readily ascertainable. For example, a restrictive covenant that protects an employer’s proprietary interests will likely be enforced. Illinois courts have identified two general situations in which an employer has a legitimate proprietary interest worthy of protection: (1) where the customer relationships are “near permanent” and but for the employee’s association with the employer, the employee would not have had contact with the customers; and (2) where the former employee acquired trade secrets or confidential information through his employment and subsequently tried to use it for his own benefit.

In determining whether a near “permanent relationship” exists, courts will look to the following seven factors: (1) the number of years required to develop the clientele; (2) the amount of money invested to acquire clients; (3) the degree of difficulty in acquiring clients; (4) the extent of personal contact by the employee; (5) the extent of the employer’s knowledge of its clients; (6) the duration of customer’s association with the employer; and (7) continuity of the employer-customer relationships.

Illinois case law reveals construction firms will have a difficult time proving a “near permanent” relationship with its customers. The main reason “near permanent” relationships do not exist in the construction industry is due to bidding. Contracts are generally awarded through a bidding process which all but guarantees no permanent relationship for two reasons. First, the employer customers, i.e. a general contractor and/or owner often do business with the employer’s competitors and, secondly, success by an employer on one job does not guarantee work on the next project. Due to the nature of the construction industry, it would be almost impossible for an employer to prohibit a former management employee and/or his new

employer from doing business with the employer's customers.

While an employee would not be barred from contacting his former employer's customers, he can be barred from divulging trade secrets or other confidential information to his new employer or using the information to his advantage. A trade secret can be a plan or process, tool, information data such as contract terms, supplier prices, productivity figures, etc. utilized by an employer in his business operations. Courts analyze the following six factors to determine whether information is a trade secret: (1) extent to which the information is known outside the business; (2) extent to which information is known to employees; (3) extent of the measures taken to guard the secrecy of the information; (4) value of information to employer and its competitors; (5) amount of effort and money expended in developing the information; and (6) relative ease or difficulty with which the information can be legitimately acquired or duplicated by others.

As a general rule, the greater the effort on the part of the employer to protect the information, the greater the likelihood the information will be protected by the court. For instance, marking certain documents as "confidential," incorporating access codes on computers, utilizing certain file cabinets for confidential documents, developing policies and procedures regarding the protection of certain information or limiting access to information to certain employees are measures that should be considered. Information that does not rise to the level of a trade secret may still be protected through clauses incorporated into employee contracts or handbooks.

III. Conclusion

After reading this article, you may determine that a review of employee contracts, handbooks, and company policies is in order. While restrictive covenants are usually executed at the time of hire or as part of severance, again, an employee can be presented with a restrictive covenant in the middle of his tenure if proper legalities are followed. Handbooks may also be amended to include provisions on protecting confidential information assuming, of course, the proper legalities are followed. Feel free to contact our office if you have any questions regarding the subjects addressed in this article.

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BERGLUND & NIEW, P.C.

Attorneys & Counselors

900 Jorie Boulevard, Suite 122

Oak Brook,

Illinois 60523