

Recent Development

To Compete or Not to Compete: Illinois' Movement to Eliminate Noncompete Agreements

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INTRODUCTION

Ella is in the process of becoming employed as a barista with Windy City Brew, an Illinois-based company. In her new position, Windy City Brew would pay Ella the minimum wage amount for the State of Illinois, which for 2017 is \$8.25 per hour. But during discussions related to her future employment contract, the manager informs Ella that Windy City Brew requires all of its employees to sign a certain agreement. This agreement prohibits employees, within the two years following the employee's termination or departure from Windy City Brew from directly or indirectly engaging with, or contributing to, any competitor of Windy City Brew in any way.¹ What Ella's employer has just required

* J.D. Candidate, expected May 2017, Loyola University Chicago School of Law. She thanks the executive board for Volume 48 of the *Loyola University Chicago Law Journal* for this opportunity, as well as her co-author, Caitlin A. Kelly, for her continued support through this process.

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1. The Authors loosely based the agreement in this hypothetical example on a form example from the Westlaw Practical Law database to demonstrate a common and basic noncompete agreement clause. *Employee Non-Compete Agreement (IL)*, PRAC. L. LAB. & EMP., Westlaw

her to sign is a classic, and somewhat standard, noncompete agreement. Fortunately for Ella, this type of agreement and the limitations it places on her post-employment plans are unenforceable, due to the newly enacted Illinois Freedom to Work Act—though other minimum-wage employees across the United States may not be so lucky.

Under contract law, noncompete clauses or agreements are agreements in which one party (usually an employee) agrees to refrain from entering into an employment situation that is in competition with the opposite party (usually the employer).² Noncompete agreements typically stem from an employer's higher bargaining power and result in lower job mobility for the employee.³

Historically, Illinois courts have heavily scrutinized noncompete agreements,⁴ often finding them to be unenforceable and categorizing them as unlawful restraints of trade.⁵ But Illinois courts typically uphold and enforce these noncompete agreements in certain situations when restraints are both “reasonable” and supported with adequate consideration.⁶ While there are several recent decisions relating to the enforceability of noncompete agreements, this Article discusses two standout cases that particularly shaped Illinois' guidelines for enforcing noncompete covenants: *Reliable Fire Equipment Co. v. Arredondo* and *Fifield v. Premier Dealer Services, Inc.*⁷

This Article also discusses the Illinois Freedom to Work Act (“Act”),

(database updated Mar. 16, 2016).

2. *Covenant*, BLACK'S LAW DICTIONARY (10th ed. 2014).

3. Ryan Burke, *What You Need to Know About Noncompete Agreements, and How States Are Responding*, WHITE HOUSE BLOG, (May 5, 2016, 11:16 AM), <https://www.whitehouse.gov/blog/2016/05/05/what-you-need-know-about-non-compete-agreements-and-how-states-are-responding>; James M. Witz & Abiman Rajadurai, *What Employers Should Know About New Ill. Noncompete Law*, LAW360 (Sept. 23, 2016, 12:14 PM), <https://www.law360.com/articles/842414/what-employers-should-know-about-new-ill-noncompete-law>.

4. The Authors recognize that sometimes noncompete agreements and restrictive covenants are used interchangeably, but that a noncompete agreement is just one type of restrictive covenant. Therefore, the Authors will use the more narrow “noncompete agreement” phrase throughout the Article when referring to agreements that restrict competition in this sense, but urge readers to note the parallels with these words.

5. David S. Repking, *Restrictive Covenants in Illinois: Adequate Consideration Problems Show That the Common Law Is an Inadequate Solution*, 90 CHI.-KENT L. REV. 1071, 1072 (2015) (discussing *Hursen v. Gavin*, 44 N.E. 735, 735 (Ill. 1896)); see also *Cambridge Eng'g, Inc. v. Mercury Partners*, 827 N.E.2d 512, 522 (Ill. App. Ct. 2007) (“Postemployment restrictive covenants operate as partial restrictions on trade, so they are scrutinized carefully . . .”).

6. *Storer v. Brock*, 184 N.E. 868, 868 (Ill. 1933); *Hursen*, 44 N.E. at 735 (“But a contract which is only in partial restraint of trade is valid, provided it is reasonable and has a consideration to support it.”).

7. *Fifield v. Premier Dealer Servs.*, 2013 IL App (1st) 120327, 993 N.E.2d 938; *Reliable Fire Equip. Co. v. Arredondo*, 2011 IL 111871, 965 N.E.2d 393.

which Illinois Governor Bruce Rauner signed into law on August 19, 2016.⁸ The Act expressly prohibits private sector employers from entering into any “covenants not to compete” (i.e., noncompete agreements) with any “low-wage employee of the employer.”⁹ While the Act provides a semispecific definition for a “low-wage employee,” the Act defines “covenant not to compete” much more broadly.¹⁰ Through this Act, Illinois has joined the list of several states taking action, legislative or otherwise, limiting the scope of noncompete agreements.¹¹

This Article first discusses how noncompete agreements are treated at the national level, as well how California courts have addressed these types of agreements. Then, this Article examines Illinois’ approach to noncompete agreements by considering precedential case law and discussing the newly enacted Act and its impact on Illinois’ noncompete agreements.

I. THE NATION’S STANCE ON NONCOMPETE AGREEMENTS

On April 15, 2016, former United States President Barack Obama signed an executive order (“Order”) providing steps to increase competition in the United States, to better inform United States consumers and workers within the market, and to support the continued growth of the American economy.¹² The Order referenced a “call to action” regarding noncompete agreements and listed best practices for state policymakers to enact reforms to reduce the prevalence of noncompete agreements that ultimately hurt workers and regional economies.¹³ The “call to action” urged policymakers to: (1) ban noncompete clauses for categories of workers such as workers under a certain wage threshold; (2) improve transparency and fairness of

8. Illinois Freedom to Work Act, 820 ILL. COMP. STAT. ANN. 90/5 (West 2016).

9. *Id.*; Jeffrey S. Piell & Matthew A. Sloan, *Illinois Prohibits Non-Competes for Low Wage Employees*, QUARLES & BRADY, LLP (Sept. 27, 2016), <http://www.quarles.com/publications/illinois-prohibits-non-competes-for-low-wage-employees/>.

10. Illinois Freedom to Work Act, 820 ILL. COMP. STAT. ANN. 90/5 (West 2016).

11. Kevin Cloutier & Mikela Sutrina, *Illinois Limits Non-Compete Agreements Yet Again*, SHEPPARD MULLIN LAB. & EMP. L. BLOG, (Sept. 7, 2016) <http://www.laboremploymentlawblog.com/2016/09/articles/non-competition-covenants/illinois-brings-down-the-hammer-on-non-compete-agreements/>.

12. *Executive Order—Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy*, WHITE HOUSE (Apr. 15, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers>.

13. *Id.*; see also STATE CALL TO ACTION ON NON-COMPETE AGREEMENTS, <https://obamawhitehouse.archives.gov/sites/default/files/competition/noncompetes-calltoaction-final.pdf> (last visited Feb. 28, 2017) (explaining the Order in detail) [hereinafter STATE CALL TO ACTION].

noncompete agreements by banning noncompete agreements, unless an employer proposed the agreement before a job offer or before the employee accepted a significant promotion; and (3) incentivize employers to write enforceable contracts and encourage the elimination of unenforceable provisions.¹⁴

And the White House is not the only branch of the United States government to express concerns with the overbreadth of noncompete agreements in the nation. The United States Department of Treasury (“Treasury”) issued a report criticizing the excessive use of noncompete agreements.¹⁵ The Treasury’s report concluded that while noncompete agreements can have important social benefits, they are frequently used in ways that are detrimental to the interests of workers and the broader economy (i.e., by imposing large costs on workers).¹⁶ The report included a state-by-state report on key dimensions of current state noncompete policies and how to address them moving forward.¹⁷

The Treasury included a state-by-state report because states vary greatly in the manner and degree to which they enforce noncompete agreements. Some states determine the enforcement of noncompete agreements pursuant to established case law, while other states rely on statutory language.¹⁸ For example, Illinois has traditionally followed an established set of case law, however, in California, statutes govern the enforceability of noncompete agreements.¹⁹

Section 16600 of the California Business and Professions Code provides that, “every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void.”²⁰ California courts strictly apply this provision and

14. STATE CALL TO ACTION, *supra* note 13.

15. See NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS, OFFICE OF ECON. POLICY, U.S. DEP’T OF TREASURY (Mar. 2016), <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf> (explaining the improper use of noncompete agreements from the United States Treasury’s perspective).

16. *Id.* Noncompete agreements can impose large, unavoidable costs on workers given worker’s reduced negotiating power. Noncompete agreements can also induce workers to leave their occupations entirely, therefore foregoing accumulated training and experience in their fields. *Id.*

17. *Id.*

18. See CAL. BUS. & PROF. CODE § 16600 (2017) (stating by statute that noncompete agreements are void in the State of California); MONT. CODE ANN. § 22-703-05 (2015) (showing an example of a state with statutory guidance regarding noncompete agreements); see also *Fifield v. Premier Dealer Serves., Inc.*, 2013 IL App (1st), 120327, ¶ 1, 993 N.E.2d 938, 939 (noting how Illinois is primarily a case law-based state and outlining Illinois’ noncompetition law).

19. CAL. BUS. AND PROF. CODE § 16600 (2017).

20. *Id.*; see also *Scott v. Snelling & Snelling, Inc.*, 732 F. Supp. 1034, 1042–43 (N.D. Cal. 1990) (holding that employee noncompete agreements are void in California even if they are reasonably limited in time and geographic scope).

invalidate agreements that preclude employees from working for competitors upon the completion of their employment.²¹ In California, not only are employer noncompete agreements void, but an employer may also be liable for wrongful termination if it fires an employee who refuses to sign an employment agreement that contains a covenant not to compete.²²

The California Supreme Court reasons that every individual possesses—as a form of property—the right to pursue any calling, business, or profession that he or she may choose.²³ Any employee also has the right to engage in a competitive business for himself or herself and to enter into competition with a former employer, even with the customers of his or her former employer, provided that the employee conducts such competition fairly and legally.²⁴

But section 16600 of the Code invalidates only those restraints that apply *after* termination of employment.²⁵ Therefore, during the term of employment, each employee owes his or her employer a common-law duty of loyalty.²⁶ This precludes the employee from competing with the employer in any way, whether by using the employer’s trade secrets or by soliciting the employer’s customers or employees.²⁷ In fact, California courts have enforced at least one noncompete clause: a clause that restricts an employee from disclosing any company trade secret during and after the term of the employment or contractual engagement.²⁸ California finds that restricting an employee from disclosing trade secrets does not completely prohibit that employee from engaging in competitive behavior.²⁹ But this enforceability does not allow an employer to simply define all information as “trade secrets” in an employee’s nondisclosure agreement.³⁰ California courts have stated that there must be factual

21. *See generally* Application Group, Inc. v. Hunter Group, Inc., 61 Cal. App. 4th 881, 895 (1998) (finding noncompete agreements to be illegal and void in the State of California).

22. D’Sa v. Playhut, Inc., 85 Cal. App. 4th 927, 933 (2000); *but see* O’Regan v. Arbitration Forums, Inc., 121 F.3d 1060, 1066 (7th Cir. 1997) (holding that O’Regan was an employee at will and was subject to termination at the option of her employer, at least for nondiscriminatory reasons).

23. Cont’l Car-Na-Var-Corp. v. Moseley, 24 Cal. 2d 104, 110 (1944).

24. *Id.*

25. CAL. BUS. & PROF. CODE § 16600 (2017).

26. *See* CAL. LAB. CODE §§ 2860, 2863 (2017) (outlining the duty of loyalty that California employees owe to their employers).

27. *Id.*

28. Muggill v. Reuben H. Donnelley Corp., 62 Cal. 2d 239, 242 (1965); Am. Credit Indem. Co. v. Sacks, 213 Cal. App. 3d 622, 633–34 (1989).

29. *See generally* Ret. Grp. v. Galante, 176 Cal. App. 4th 1226 (2009) (discussing the intersection between prohibiting disclosure of trade secrets and ensuring free competition).

30. *See, e.g.,* Am. Paper. & Packaging Prod., Inc. v. Kurgan, 183 Cal. App. 3d 1318, 1325 (1986) (finding that there must be limits as to what is considered a trade secret under an employment

proof behind the designation to support the trade-secret clause and that the designation of information as a “trade secret” is not decisive in determining whether the court will regard it as such.³¹ But overall, California, has created a strict statutory scheme that encourages competition in the workplace and allows greater job opportunities for the citizens of California.³² California law as it stands will continue to be a model for other states moving forward in reevaluating and rewriting their noncompete laws and statutes.

II. ILLINOIS’ CONSTRICTING APPROACH TO NONCOMPETE AGREEMENTS

Historically, common law has governed the enforceability of noncompete agreements between an employer and employee in Illinois.³³ Pursuant to the common-law approach, Illinois courts will only enforce a noncompete agreement if it is ancillary to either a valid contract or relationship, supported by adequate consideration, and is reasonably necessary to protect the legitimate business interest of the employer.³⁴

As Illinois courts and the Illinois legislature continue to shape enforcement of noncompete agreements and reform noncompete laws over time, they can look to other states for guidance. Recently, Illinois has sought to reduce the number of enforceable noncompete agreements and has joined a list of several states leaning toward substantially limiting or abolishing noncompete agreements.³⁵ Similar to the statutory guidance in California, Illinois enacted the Act, which will continue to lead Illinois law toward a stricter statutory scheme for regulating noncompete agreements and away from the once used common law.

A. Applicable Tests to Determine the Enforceability of Noncompete Agreements in Illinois

Illinois courts have established that for a noncompete agreement to be enforced, the agreement must be (1) reasonable and (2) supported by adequate consideration³⁶—two somewhat ambiguous standards. The

contract in California).

31. *Am. Paper*, 183 Cal. App. 3d at 1325.

32. CAL. BUS. AND PROF. CODE § 16600 (2017).

33. 820 Ill. Comp. Stat. 90/1–90/10 (2017).

34. Peter A. Steinmeyer & David J. Clark, *Non-Compete Laws: Illinois*, PRAC. L. LAB. & EMP., Westlaw (2017).

35. See *supra* Part II (discussing the Illinois Freedom to Work Act (“Act”)); *infra* Part I (discussing California’s noncompete laws).

36. *Reliable Fire Equip. Co. v. Arredondo*, 2011 IL 111871, ¶ 16, 965 N.E.2d 393, 396; *Brown & Brown, Inc. v. Mudron*, 887 N.E.2d 437, 440–41 (Ill. App. Ct. 2008) (establishing the base requirements for any noncompete agreement or similar contractual agreement to be held enforceable in Illinois).

2011 Illinois Supreme Court decision in *Arredondo* was one that attempted to solidify the formula and clarify the court's standards in determining the reasonableness of a noncompete agreement.³⁷ In *Arredondo*, Reliable Fire Equipment Company ("Reliable") filed a complaint against two former employees and the employees' new place of employment, alleging a breach of their noncompete agreement.³⁸ When Reliable hired the two employees—Rene Garcia and Arnold Arredondo—it required them to sign noncompete agreements.³⁹ But after signing these agreements, both employees became managers at the newly formed High Rise Security Systems, LLC ("High Rise")—a company that had a stated business purpose eerily similar to Reliance's mission of selling, servicing, and engineering fire alarm systems.⁴⁰

Reliable's founder felt unnerved by this information and confronted the employees, asking if they were planning on competing with Reliable, but both employees denied the allegations.⁴¹ But within two months of the confrontation, Arredondo resigned, and Reliable released Garcia on grounds of suspicion of competition.⁴² Reliable later filed a complaint, alleging that Reliable entered into valid noncompete agreements with the two employees and that the employees had breached the valid agreements.⁴³ The circuit court ruled that the noncompete agreements were unenforceable.⁴⁴ A divided Illinois Appellate Court ultimately affirmed the circuit court's holding, and Reliable subsequently appealed to Illinois' highest court.⁴⁵

37. Helen W. Gunnarsson, *Employment Covenants Not to Compete: The High Court Lays Down The Law*, ILL. BAR J. (Jan. 2012), <https://www.isba.org/ibj/2012/01/lawpulse/employmentcovenantsnottocompetetheh> (discussing the facts and prior history of *Reliable Fire Equipment Co. v. Arredondo* and how the court overruled appellate court case law to clarify the standards set in place in their opinion).

38. *Arredondo*, 2011 IL 111871, ¶ 3, 965 N.E.2d at 394.

39. *Id.* ¶ 4, 965 N.E.2d at 394–95. The noncompete agreement signed by both Garcia and Arredondo required employees to not compete with Reliable at any time during their employment, as well as forbade the employees from competing with Reliable in any way after their termination for one year in the states of Illinois, Indiana, and Wisconsin. *Id.* ¶ 4, 965 N.E.2d at 394–95.

40. *Id.* ¶ 5, 965 N.E.2d at 395. Arredondo first began seeking financing for High Rise LLC in March 2004, while still employed with Reliable. *Id.* ¶ 5, 965 N.E.2d at 395. In April 2004, High Rise formed into a limited liability company. Shortly thereafter, in August of the same year, both employees signed an operating agreement for High Rise. Gunnarsson, *supra* note 37.

41. *Arredondo*, 2011 IL 111871, ¶ 6, 965 N.E.2d at 395.

42. *Id.* ¶ 6, 965 N.E.2d at 395.

43. *Id.* ¶ 7, 965 N.E.2d at 395.

44. *Id.* ¶ 8, 965 N.E.2d at 395 (referencing *Reliable Fire Equipment Co. v. Arredondo*, 2007 WL 73338515 (Ill. Cir. Ct. 2007)).

45. *Id.* ¶ 9, 965 N.E.2d at 395; see *Reliable Fire Equip. Co. v. Arredondo*, 940 N.E.2d 153 (Ill. App. Ct. 2010). The Illinois Appellate Court first discusses the origin of restrictive covenants, and the common law surrounding them, before concluding that the circuit court's decision that Reliable has no legitimate business interest to support the enforceability of the restrictive covenants.

The Illinois Supreme Court reversed and remanded the case and asserted two key holdings: (1) that the legitimate business interest of an employer was an important component of Illinois' reasonableness test that determines the enforceability of a noncompete agreement; and (2) that a court should determine whether a legitimate business interest is present on a case-by-case basis by looking to the totality of facts and circumstances.⁴⁶

The Illinois Supreme Court in *Arredondo* relied on Illinois common law's well-established three-pronged test when it determined the reasonableness of the employees' noncompete agreements.⁴⁷ This three-pronged test specifies that a noncompete agreement is reasonable only if the agreement: (1) is no greater than is required to protect a legitimate business interest of the employer; (2) does not impose undue hardship on the employee; and (3) is not injurious to the public.⁴⁸

First, the court discussed that while the appellate court in some cases has questioned whether Illinois recognizes the legitimate business interest as a requirement for reasonableness, it is very much a requirement and one that Illinois courts have recognized numerous times.⁴⁹ Moreover, the court cited to several Illinois opinions, all of which specifically established that a legitimate business purpose or interest (as a part of the three-pronged test) is a requirement for testing reasonableness in noncompete agreements.⁵⁰ To further assert its position regarding the validity of the legitimate business interest component of the three-pronged test, the court overruled the appellate court's findings in *Sunbelt Rentals, Inc. v. Ehlers* that the legitimate business interest component of the three-pronged test was never actually

Arredondo, 940 N.E.2d at 180–84. The concurrence by Justice Hudson echoed that the conclusion was correct, though the reasoning behind it was not. *Id.* at 184 (Hudson, J., specially concurring).

46. *Arredondo*, 2011 IL 111871, ¶ 43, 965 N.E.2d at 403.

47. *Id.* ¶ 17, 965 N.E.2d at 396–97 (quoting *BDO Seidman v. Hirshberg*, 712 N.E.2d 1220, 1223 (N.Y. 1999)).

48. *Id.* ¶ 17, 965 N.E.2d at 396–97 (noting that the “extent of the employer’s legitimate business interest may be limited by type of activity, geographical area, and time”).

49. *Id.* ¶ 17, 965 N.E.2d at 397 (“This court long ago established the three-dimensional rule of reason in Illinois and has repeatedly acknowledged the requirement of the promisee’s [employer’s] legitimate business interest down to the present day.”).

50. *Id.* ¶¶ 18–24, 965 N.E.2d at 397–98 (noting that court “has repeatedly recognized the three-dimensional rule of reason, specifically including the element of the legitimate business interest of the promisee”); *see generally* *Mohanty v. St. John Heart Clinic, S.C.*, 866 N.E.2d 85 (Ill. 2006) (establishing that the legitimate business purpose factor is a necessary requirement when attempting to distinguish the reasonableness of an agreement); *House of Vision, Inc. v. Hiyane*, 225 N.E.2d 21 (Ill. 1967) (same); *Cockerill v. Wilson*, 281 N.E.2d 648 (Ill. 1972) (same); *Bauer v. Sawyer*, 134 N.E.2d 329 (Ill. 1956) (same); *Hursen v. Gavin*, 44 N.E. 735 (Ill. 1896) (same); *Linn v. Sigsbee*, 67 Ill. 75 (1873) (same).

valid in Illinois.⁵¹

The court then discussed the proper definition of a legitimate business purpose.⁵² The court discussed how several Illinois courts have attempted to delineate the applicable factors,⁵³ but that these “lists of factors” do not provide an exact formula and are not intended to be exclusive.⁵⁴

The court noted that in *Nationwide Advertising Service, Inc. v. Kolar*, the Illinois Appellate Court attempted to create an exact formula to assess if a legitimate business interest is present.⁵⁵ The Illinois Appellate Court in *Kolar* proposed a two-factor test, finding that a court would enforce a noncompete agreement if: (1) the employee acquired confidential information during the course of his or her employment and used that information to benefit himself or herself and (2) there was a near-permanent customer relationship present.⁵⁶ While many Illinois courts have applied this test to determine the enforceability of noncompete agreements in the wake of *Kolar*,⁵⁷ the court in *Arredondo* strikes down

51. *Arredondo*, 2011 IL 111871, ¶¶ 28–30, 965 N.E.2d at 399–400 (citing *Sunbelt Rentals, Inc. v. Ehlers*, 915 N.E.2d 862, 869 (Ill. App. Ct. 2009)).

52. *Id.* ¶¶ 33–35, 965 N.E.2d at 400–01.

53. *Id.* ¶¶ 33–35, 965 N.E.2d at 400–01; *see also* *Chambers-Dobson, Inc. v. Squier*, 472 N.W.2d 391 (Neb. 1991) (finding that a list of factors does not properly encompass any and all possible scenarios, and therefore is not the one, true appropriate method for determining a legitimate business interest); *Arthur Murray Dance Studios of Cleveland Inc. v. Witter*, 105 N.E.2d 685, 695 (Ohio Ct. C.P. 1952) (affirming *Briggs v. Butler*, 45 N.E.2d 757, 761 (Ohio 1942), stating that a list of conditions is not an effective way to precisely identify a legitimate business purpose, as a list is expansive and ever-changing); *see generally* 15 GRACE MCLANE GIESEL, CORBIN ON CONTRACTS, § 80.6 at 70 (rev. ed. 2003).

54. *Arredondo*, 2011 IL 111871, ¶ 35, 965 N.E.2d at 401 (“The factors or considerations to be used in that balancing test are not weighted; that is there is no prescribed method by which more or less weight is assigned to each factor to be considered in the balancing test” (quoting *Chambers-Dobson, Inc. v. Squier*, 472 N.W.2d 391, 400 (Neb. 1991))); *see also* *Arthur Murray*, 105 N.E.2d at 695 (“The determination of the necessity for such restriction is dependent upon the nature and extent of the business and the nature and extent of the service of the employee in connection therewith *and other pertinent conditions*.” No court seems to have attempted to make a list of those “other pertinent conditions.”).

55. *Arredondo*, 2011 IL 111871, ¶ 36, 965 N.E.2d at 401 (referring to *Nationwide Advert. Serv., Inc. v. Kolar*, 329 N.E.2d 300 (Ill. App. Ct. 1975)).

56. *See* *Nationwide Advert. Serv.*, 329 N.E.2d at 302 (holding that because the defendant had been a total stranger to the area in which he was hired, and that his employment opportunity with the plaintiff provided him with his future contacts and the clientele, the plaintiff had a legitimate business interest in limiting the defendant and requiring a noncompete agreement); *see generally* *Canfield v. Spear*, 254 N.E.2d 433 (Ill. 1969) (enforcing a noncompete agreement after finding that a doctor who had never lived in Rockford, Illinois, prior to joining a certain medical group and who had not brought a single client with him, exhibited a near-permanent customer relationship).

57. *See generally* *Hanchett Paper Co. v. Melchiorre*, 792 N.E.2d 395 (Ill. App. Ct. 2003) (finding that the two-pronged test defined in *Kolar* was a fair and accurate way to determine the enforceability of agreements in disputes regarding noncompete agreement); *Dam, Snell & Taveirne, Ltd. v. Verchota*, 754 N.E.2d 464, 468–69 (Ill. App. Ct. 2001) (same); *Carter-Shields v.*

this “test,” finding that the factors are mere aids in determining a legitimate business interest.⁵⁸ Additionally, the *Arredondo* court explains that a legitimate business purpose is only one prong of the test to determine reasonableness, and to determine if this interest is present, courts should look to the totality of the circumstances and decide on a case-by-case basis.⁵⁹

By reaching this conclusion, the court seemingly establishes once and for all that a legitimate business interest is still a viable test in the three-pronged analysis of determining enforceability of noncompete agreements and that when deciphering whether a legitimate business interest is present, each individual case must be assessed and all facts and circumstances must be considered.⁶⁰

Fifield is another key case in the formation of Illinois’ trend of limited enforcement of noncompete agreements.⁶¹ In this case, the First District of the Illinois Appellate Court affirmed a circuit court’s less-than-clear decision that required another requirement—adequate consideration—to be present for a court to enforce a noncompete agreement.⁶²

In *Fifield*, an employee of a separate company, Great American Insurance Company (“GAIC”), worked almost exclusively with Premier Dealer Services (“Premier”) during his time at GAIC.⁶³ But after the sale of Premier to Premier Dealer Services Holdings, LLC (“PDS Holdings”), Fifield was alerted that he would be let go from GAIC but that PDS Holdings had a job offer for him.⁶⁴ With this new arrangement, however,

Alton Health Inst., 739 N.E.2d 569, 575–76 (Ill. App. Ct. 2000) (same); Springfield Rare Coin Galleries, Inc. v. Mileham, 620 N.E.2d 479, 484–85 (Ill. App. Ct. 1993) (same); A.B. Dick Co. v. Am. Pro-Tech, 514 N.E.2d 45, 48–49 (Ill. App. Ct. 1987) (same); Reinhardt Printing Co. v. Feld, 490 N.E.2d 1302, 1306–07 (Ill. App. Ct. 1986) (same).

58. Reliable Fire Equip. Co. v. Arredondo, 2011 IL 111871, ¶ 42, 965 N.E.2d 393, 403.

59. *Id.* ¶ 42, 965 N.E.2d at 403. The court notes that the precedent applying the *Kolar* test is still valid, however these tests and factors are nonconclusive and only applicable when determining legitimate business interests as a part of the three-pronged enforceability analysis—not as the three-pronged analysis’ replacement. *Id.* ¶ 42, 965 N.E.2d at 403.

60. *Id.* ¶ 43, 965 N.E.2d at 403.

61. *Fifield v. Premier Dealer Servs., Inc.*, 2013 IL App (1st), 120327, 993 N.E.2d 938.

62. *Fifield*, 2013 IL App. (1st) 120327, ¶ 21, 993 N.E.2d at 944; see Ford, Harrison, LLP, *Upon Further Consideration, Clarity Is Elusive*, 24 ILL. EMP. L. LETTER 6, 6 (June 2014) (“Following the appellate court’s decision in *Fifield*, business and employer advocacy groups were hopeful that the Illinois Supreme Court would agree to hear the case on appeal and provide more clarity on the enforceability of restrictive covenants. However, the high court declined to do so.”).

63. GAIC actually owned Premier until GAIC sold the company to Premier Dealer Services Holdings, LLC, a separate and third party. *Fifield*, 2013 IL App. (1st) 120327, ¶ 3, 993 N.E.2d at 939; see also Brief for Appellant at 1–2, *Fifield*, 2013 IL App. (1st) 120327, 993 N.E.2d 938 (No. 10 CH 9204) (providing details of the company’s ownership over the course of the events which lead to the litigation).

64. *Fifield*, 2013 IL App. (1st) 120327, ¶ 3, 993 N.E.2d at 939.

Fifield was required to sign an agreement prior to his employment, which included several nonsolicitation and noncompetition provisions.⁶⁵ After signing the agreement, Fifield began working for PDS Holdings, but resigned a mere three days after the beginning of his employment.⁶⁶ Shortly after his departure, another competitor of PDS Holdings, Enterprise Financial Group, Inc. (“EFG”) employed Fifield.⁶⁷

The Illinois Appellate Court starts its analysis by clarifying that, for it to enforce a noncompete agreement similar to the one in *Fifield*, the terms of that covenant must be reasonable—a standard that preceding case law established.⁶⁸ But before reaching this analysis, the court must decide two additional facts: (1) whether the noncompete agreement was ancillary to a valid contract and (2) whether there was adequate consideration supporting the agreement.⁶⁹ The issue that the Illinois Appellate Court faced was whether adequate consideration had been given in support of the agreement that Fifield signed, prior to his employment with PDS Holdings.⁷⁰

PDS Holdings began its argument with the idea that the consideration offered in this agreement was Fifield’s employment opportunity itself.⁷¹ Additionally PDS Holdings asserted that the agreement may have been a noncompete agreement, but that it was not a postemployment restrictive covenant⁷² because Fifield was not technically an employee at the time of the signing.⁷³ Fifield and EFG countered by claiming that PDS Holdings did not provide adequate consideration to support the agreement given that Illinois law typically equates two years of continued employment as adequate consideration.⁷⁴

65. *Id.* ¶ 3, 993 N.E.2d at 939. Fifield negotiated with Premier regarding the agreement and successfully convinced the parties to agree to a provision which stated that the restrictive provisions in the agreement would not apply if the company terminated Fifield without cause during the first year of his employment. *Id.* ¶ 4, 993 N.E.2d at 940.

66. *Id.* ¶ 4, 993 N.E.2d at 940; Repking, *supra* note 5, at 1072.

67. *Fifield*, 2013 IL App. (1st) 120327, ¶ 4, 993 N.E.2d at 940.

68. *Id.* ¶ 13, 993 N.E.2d at 942.

69. *Id.* ¶ 13, 993 N.E.2d at 942; *see also* Lawrence & Allen, Inc. v. Cambridge Human Res. Grp., Inc., 685 N.E.2d 434, 440 (Ill. App. Ct. 1997) (noting the additional facts a court must discuss prior to analyzing whether a contract is reasonable).

70. *Fifield*, 2013 IL App. (1st) 120327, ¶ 13, 993 N.E.2d at 942.

71. *Id.* ¶ 9, 993 N.E.2d at 940–41. PDS Holdings argued that because Fifield was not employed at the time of signing, unlike the Illinois case law Fifield relied on in his arguments, the employment offer was adequate consideration. *Id.* ¶ 9, 993 N.E.2d at 940–41.

72. The court did not approve PDS Holdings’ proposed arbitrary definition of a “postemployment restive covenant.” *Id.* ¶ 18, 993 N.E.2d at 943.

73. “Premier argues that the holding in [*Mudron*] is not applicable to this case because, unlike the defendant in [*Mudron*], Fifield was not employed by Premier when he signed the agreement.” *Id.* ¶ 17, 993 N.E.2d at 943.

74. *Id.* ¶ 10, 993 N.E.2d at 941 (explaining that Illinois courts have also noted that the length of

The Illinois Appellate Court agreed with Fifield in that the fact pattern of another appellate court decision, *Brown & Brown, Inc. v. Mudron*, resembled the facts in *Fifield*.⁷⁵ In *Mudron*, *Brown & Brown, Inc.* required the defendant-employee to sign an employment agreement after *Brown & Brown, Inc.*, purchased her original employer, John Manner Insurance Agency.⁷⁶ This employment agreement contained a noncompete agreement, prohibiting the employee from competing with *Brown & Brown, Inc.*, in any way for two years after her employment had ceased.⁷⁷ But seven months after signing the agreement, the employee resigned and began working for a competitor of *Brown & Brown, Inc.*, at which time her former employer brought a lawsuit against her for breach of contract.⁷⁸ The Illinois Appellate Court in *Mudron* held that without any additional benefits, seven months of continued employment was not adequate consideration to support the noncompete agreement.⁷⁹ Pursuant to the reasoning in *Mudron*, the court in *Fifield* reasoned that if seven months in *Mudron* was not adequate for consideration, surely three months did not meet the standard either.⁸⁰

In *Fifield*, PDS Holdings argued that *Mudron* was distinguishable because in *Mudron*, the employee signed the agreement while employed, but the employee in *Fifield* signed the agreement *prior* to his

time required to constitute adequate consideration remains the same (historically, two years) regardless of the circumstances surrounding the employee's exit from the company).

75. *Id.* ¶ 17, 993 N.E.2d at 943 (refusing to agree with PDS Holdings' allegation that *Mudron* is not dispositive of the issues in this case); see *Brown & Brown, Inc. v. Mudron*, 887 N.E.2d 437, 440 (Ill. App. Ct. 2008) ("Under Illinois law, continued employment for a substantial period of time beyond the threat of discharge is sufficient consideration to support a restorative covenant in an employment agreement.").

76. *Mudron*, 887 N.E.2d at 438–39.

77. *Id.* at 438–39. In *Mudron*, the defendant worked as a customer service representative for her employer. *Id.* The agreement listed a number of competitive practices the employee was prohibited from partaking in, including soliciting or servicing any of the plaintiff's customers, and disclosing confidential information. *Id.* The Authors note that the case's language refers to the agreement as a "postemployment restrictive covenant," but for the purposes of this Article, the nature of the discussed agreement is that of a noncompete agreement, and the enforceability standards remain the same.

78. *Id.*

79. *Id.* at 441; see also *Mid-Town Petroleum, Inc. v. Gowen*, 611 N.E.2d 1221, 1227 (Ill. App. Ct. 1993) ("Here, Gowen's continued post contract employment was approximately seven months. We note, here, that Gowen's continued post contract employment was comparatively insubstantial."). The court cites to *Mid-Town* to assert that seven months of employment is insufficient to establish adequate consideration in this case, regardless if the employee resigned. *Mudron*, 887 N.E.2d at 440–41.

80. *Fifield*, 2013 IL App. (1st) 120327, ¶ 19, 993 N.E.2d at 943; see *Mudron*, 887 N.E.2d at 441 (comparing the durations of employment to show a lack of adequate consideration); see also Repking, *supra* note 5, at 1079 (comparing the facts of *Mudron* to that of *Fifield* to support the court's final findings that there was no consideration adequate enough to enforce the contract in *Fifield*).

employment.⁸¹ The *Fifield* court rejected this argument and found that no difference existed between an employee signing an agreement at the *start* of his or her employment and an employee who signed an agreement *during* his or her employment.⁸²

The *Fifield* court's holding provides a clearer analysis for determining adequate consideration by holding that an Illinois court will not enforce a noncompete agreement without two years of consecutive employment or some other type of consideration.⁸³ Employers may find themselves attempting to create additional benefits or advantages to offer employees in hopes of passing the test to establish the adequate consideration, or fear that any noncompete agreement executed may not provide the protection they had hoped it would.⁸⁴ These cases demonstrate how Illinois courts dissect noncompete agreements and how they diligently analyze the facts and apply case law, typically in favor of nonenforcement.⁸⁵

B. *The Illinois Freedom to Work Act*

Though Illinois case law provided a basis for analyzing noncompete agreements, the Illinois legislature faced statewide concerns regarding noncompete agreements, specifically regarding the highly restrictive noncompete terms included in the hourly employee employment agreements of a popular sandwich franchise, Jimmy John's.⁸⁶

81. *Fifield*, 2013 IL App. (1st) 120327, ¶ 17, 993 N.E.2d at 943.

82. *Id.* ¶ 17, 993 N.E.2d at 943; *see generally* *Bires v. WalTom, LLC*, 662 F. Supp. 2d 1019 (N.D. Ill. 2009) (discussing further that the time at which an employee signs a noncompete agreement has no bearing on whether the agreement shall be enforced). In *Bires v. WalTom, LLC*, a racecar driver signed a noncompete agreement that prohibited him from negotiating or signing with another team for forty-five days from the day of his employment. *Bires*, 662 F. Supp. 2d at 1024. But, the driver signed the agreement during his employment (i.e., not prior to his start date). *Id.* The United States District Court in the Northern District of Illinois held that there was no difference between covenants that are signed pre- or post- start of employment. *Id.* at 1030. Additionally, the Seventh Circuit made it very clear that “the only effect of drawing a distinction between pre-hire and post-hire covenants would be to induce employers whose employees had signed such a covenant after they started working to fire those employees and rehire them the following day with a fresh covenant not to compete.” *Id.* (referring to the Seventh Circuit holding in *Curtis 1000 Inc., v. Suess*, 24 F.3d 941, 947 (7th Cir. 1994)).

83. Repking, *supra* note 5, at 1072.

84. *Id.* at 1080 (discussing how the use of bonuses or promotions within the employee's current scope of employment have been discussed as options to provide additional benefits to employees in hopes of protecting restrictive covenants). The Authors note, however, that promotions within the employee's current employment opportunity will likely not justify as an “additional benefit” for recently hired employees as courts may consider these bonuses as a mere signing bonus applicable to all employees—lowering the appeal of these types of advantages for highly sought after employees. *Id.* at 1080–81.

85. *Reliable Fire Equip. Co. v. Arredondo*, 2011 IL 111871, ¶ 42, 965 N.E.2d 393, 403; *see Fifield*, 2013 IL App. (1st) 120327, ¶ 4, 993 N.E.2d at 940 (restricting overbroad enforcement of noncompete agreements in Illinois).

86. *See* Complaint at 17, *People v. Jimmy John's Franchise LLC*, No. 2016-CH-07746 (Ill. Cir.

In June 2016, the Illinois Attorney General, Lisa Madigan, filed a lawsuit against two Jimmy John's corporate entities.⁸⁷ The complaint argued that the noncompete agreements that Jimmy John's forced their low-wage employees to sign were illegal and unenforceable under Illinois law.⁸⁸ Attorney General Lisa Madigan, arguing on behalf of the State of Illinois, asserted that the noncompete agreements that Jimmy John's required their employees to sign restricted their low-wage employees during, and for two years after, their employment from working in any other business that earned more than 10 percent of its revenue from selling "submarine-hero-type, deli-style, pita, and/or wrapped or rolled sandwiches."⁸⁹ The noncompete agreement also applied to any sandwich business located within three miles of any Jimmy John's sandwich shop.⁹⁰ Attorney General Madigan reasoned that "preventing employees from seeking employment with a competitor is unfair to Illinois workers and bad for Illinois businesses" and that "by locking low-wage workers into their jobs and prohibiting them from seeking better paying jobs elsewhere, the companies have no reason to increase their wage or benefits."⁹¹

In December 2016, Jimmy John's agreed to settle with the Illinois Attorney General's office and agreed to use noncompete agreements that complied with Illinois law going forward.⁹² In other words, Jimmy

Ct. June 8, 2016) (alleging that all of Jimmy John's noncompete agreements with minimum wage employees should be found to be illegal as they unfairly lock minimum-wage employees into their jobs); see also *Madigan Sues Jimmy John's for Imposing Unlawful Non-Compete Agreements on Sandwich Makers and Delivery Drivers*, ILL. ATT'Y GEN. (June 8, 2016), http://www.illinoisattorneygeneral.gov/pressroom/2016_06/20160608.html [hereinafter *Madigan Sues Jimmy John's*] (stating that the agreements in question were signed primarily by low-wage sandwich shop employees, including delivery drivers whose primary job tasks involved taking food orders and making and delivering sandwiches).

87. Complaint, *Jimmy John's Franchise LLC*, No. 2016-CH-07746; see also *Madigan Sues Jimmy John's*, *supra* note 86 (stating that the noncompete agreements affected an astonishing number of people in Illinois given that together with its franchise and the corporate locations, Jimmy John's operates nearly 300 sandwich shops in Illinois).

88. Complaint, *Jimmy John's Franchise LLC*, No. 2016-CH-07746.

89. *Id.*

90. *Id.* (stating that a later version of the agreement limited this to two miles within any Jimmy John's located within the United States).

91. *Id.*; see *Madigan Sues Jimmy John's*, *supra* note 86 (explaining Jimmy John's lawsuit in detail).

92. Jimmy John's settled to pay \$100,000 to the Illinois Attorney General's office for education and outreach, specifically to raise public awareness on how noncompete agreements can be enforced. *Madigan Announces Settlement with Jimmy John's for Imposing Unlawful Non-Compete Agreements*, ILL. ATT'Y GEN. (Dec. 7, 2016), http://www.illinoisattorneygeneral.gov/pressroom/2016_12/20161207.html. Jimmy John's also agreed to notify all current and former low-wage sandwich shop employees and delivery drivers that their noncompete agreements will not be enforced, remove the noncompetes from materials required from new hires, and notify franchisees to void any noncompete agreements that were

John's agreed to base all noncompete agreements "on a legitimate business interest" and to narrowly tailor the agreements "in terms of time, activity, and place."⁹³

But this promise was not good enough for the Illinois legislature. The Illinois legislature did not want this situation to occur in other Illinois companies. Therefore, the legislature passed the Act, which bans noncompete agreements for low-wage, private-sector employees, and Illinois Governor Bruce Rauner signed the Act into law on August 19, 2016.⁹⁴ The Act does not retroactively apply and therefore concerns only agreements presented to low-wage employees on or after January 1, 2017.⁹⁵

The Act defines a "low-wage employee" as an employee who earns the greater of (1) the applicable federal (\$7.25 per hour), state (\$8.25 per hour), or local minimum wage (\$10.50 hour), or (2) \$13.00 per hour.⁹⁶ Moreover, the Act broadly defines "covenant not to compete" as an agreement between an employer and a low-wage employee that restricts the employee from performing: (1) any work for another employer for a specified period of time; (2) any work in a specified geographical area; or (3) work for another employer that is similar to the low-wage employee's work for the employee in question.⁹⁷ The requirements of

modeled after Jimmy John's corporate version. *Id.*

93. *Id.* (noting that the Act now applies to all low-wage employees and the future noncompete agreements only apply to workers making \$13.00 per hour or more); see also *Jimmy John's Agrees to Pay \$100,000 to Illinois AG over Non-compete Contracts*, CHICAGO TRIB., (Feb. 28, 2017), <http://www.chicagotribune.com/business/ct-jimmy-johns-settlement-1208-biz-20161207-story.html> (stating that Jimmy John's has agreed to pay \$100,000 in the settlement with the Illinois Attorney General's office).

94. Illinois Freedom to Work Act, 820 ILL. COMP. STAT. ANN. 90/5 (West 2016); see also *Bill Status of SB3163*, ILL. GEN. ASSEMBLY, <http://www.ilga.gov/legislation/billstatus.asp?DocNum=3163&GAID=13&GA=99&DocTypeID=SB&LegID=96505&SessionID=88&SpecSess=> (last visited Mar. 4, 2017) (detailing the Illinois legislature's process in approving the Act); see also Kevin M. Cloutier, *Illinois Limits Non-Compete Agreements Yet Again*, NAT'L L. REV. (Sept. 7, 2016), <http://www.natlawreview.com/article/illinois-limits-non-compete-agreements-yet-again> ("All too often, employers routinely issue non-compete agreements with new hire packets to employees who pose no real threat to the company's legitimate business or protectable interests if they were to leave the company and join a competitor. Under judicial scrutiny, these agreements would likely not pass muster due to the lack of underlying protectable interests."); see also James M. Witz & Abiman Rajadurai, *What Employers Should Know About New Ill. Noncompete Law*, LAW360 (Sept. 23, 2016, 12:14 PM), <https://www.law360.com/articles/842414/what-employers-should-know-about-new-ill-noncompete-law> (informing Illinois employees of their new rights associated with the Act).

95. Illinois Freedom to Work Act, 820 ILL. COMP. STAT. ANN. 90/5 (West 2016).

96. *Id.*

97. *Id.* Though it defines "covenant not to compete" broadly, the Act does not apply to nondisclosure agreements or covenants restricting solicitation of customers or employees. *Id.*; Steven L. Brennenman, *Illinois Law Will Ban Restrictive Covenants for Low Earners*, 27 ILL. EMP.

the Act differ greatly from a “normal” case involving noncompete agreements in Illinois.⁹⁸ Under Illinois law, courts generally enforce noncompete agreements that restrict the employee from competing in a specific geographical area for no longer than required to protect the employer.⁹⁹ Illinois courts typically require the specific geographical area to be no more than 100 miles in radius from the current employer.¹⁰⁰

Overall, the Act will have a positive impact on Illinois employees.¹⁰¹ The Act will allow low-wage employees more employment options, as they will not be restricted by their initial minimum wage job.¹⁰² The Act was a very clear response by the Illinois legislature that it will not allow for overuse of noncompete agreements by employers and that the legislature is here to protect the employees of Illinois.¹⁰³

CONCLUSION

The Illinois legislature’s enactment of the Act clearly demonstrates and exemplifies the nation’s movement toward drastically limiting—or completely eliminating—the scope and enforceability of noncompete agreements. Employers in Illinois who continue to require noncompete agreements across all areas of work must take this Act into consideration and adjust their practices adequately.¹⁰⁴ While the Act currently appears to apply only to noncompete agreements, not all restrictive covenants, Illinois employers should stay informed for possible future statutes or court cases expanding the reach of the Act.¹⁰⁵ Furthermore, Illinois courts will not enforce agreements at all if the employees make less than \$13.00 dollars per hour.¹⁰⁶ But the Act serves as a healthy reminder to Illinois employers that Illinois courts will continue to heavily scrutinize noncompete agreements and will only enforce them if they are reasonably tailored to protect a legitimate business interest of the employer and align with the geographical limitations required by the Illinois courts in

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98. See *supra* Part II.A. (discussing Illinois’ noncompete laws in detail).

99. Liataud v. Liataud, 221 F.3d 981, 987 (7th Cir. 2000).

100. Shorr Paper Prod., Inc. v. Frary, 392 N.E.2d 1148, 1152 (Ill. App. Ct. 1979) (stating that in a “normal” case involving the enforceability of a noncompete agreement, an appropriate geographical area to restrict an employee is 100 miles).

101. See Cloutier, *supra* note 94 (explaining the benefits to employees of restricting noncompete agreements).

102. *Id.*

103. See *supra* notes 94–103 and accompanying text (discussing the Act).

104. See Repking, *supra* note 5, at 1072 (discussing what employers will need to address in future noncompete agreements).

105. See Brennenman, *supra* note 97, at 7 (stating that the Act currently only applies to noncompete agreements between employers and low-level employees).

106. Illinois Freedom to Work Act, 820 ILL. COMP. STAT. ANN. 90/5 (West 2016).

noncompete agreements.¹⁰⁷

107. *Shorr Paper Prod., Inc. v. Frary*, 392 N.E.2d 1148, 1151–52 (Ill. App. Ct. 1979); Repking, *supra* note 5, at 1072–74.