Continued Employment Adequate Consideration for Non-Compete Imposed Mid-Employment, Hawaii Judge Rules

By **Andrew L. Pepper**

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Considering whether Hawaii state law would require additional consideration for a non-compete imposed mid-employment, a federal judge has held that "the Hawaii Supreme Court would not require additional consideration beyond continuing at-will employment for [post-employment] restrictive covenants." *Standard Register v. Keala,* Civ. No. 14-00291 JMS-RLP (D. Haw., June 8, 2015).

The Court framed the issue as:

> ...whether non-competition agreements require *additional* consideration beyond continued at-will employment before binding agreements are formed. The issue arises if a current employee is required to sign such an agreement as a condition of continued employment, without any further benefits or consideration.

(Emphasis of the court.)

Finding that "this is an open issue under Hawaii law" that will "likely arise again," the Court was forced to make an educated guess as to how the Hawaii Supreme Court might decide the issue. Seeking guidance, the Court noted that "a federal court may be aided by looking to well-reasoned decisions from other jurisdictions."

Because the Court found "[o]utside of Hawaii, authorities are split," it resorted to the Restatement of Employment Law, § 8:06 (Proposed Final Draft, April 18, 2014), to reconcile the split in authority. In doing so, the Court concluded: "[T]he clear majority position is . . . an offer of continued at-will employment is, by itself, sufficient consideration for a non-competition agreement."

Examining the Restatement, the Court counted 30 states in the "continued employment is adequate consideration" camp with only 9 states requiring something more (not always clearly saying what) to establish consideration for a mid-career restrictive covenant.

The Court found the majority of the states' rationale compelling "because forbearance in exercising a legal right is valid consideration" and, thus, "continued at-will employment is not worthless or illusory." Furthermore, the Court noted that "inadequacy of consideration alone is not a fatal defect" as "the law concerns itself only with the existence of legal consideration" and that "adequacy, in fact, as distinguished from value in law, is for the parties to judge for themselves."

Turning to whether there should be one rule for pre-employment non-competes (which the Court deemed always to carry sufficient consideration) and covenants imposed

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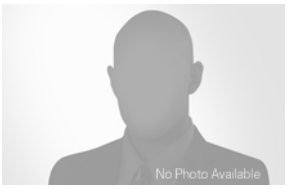

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after the inception of the employment relationship, the Court adopted a "practical approach." It held that pre- and post-employment covenants not to compete should be treated the same:

> If we were to hold that consideration beyond continued employment is necessary in cases like this, an employer might simply fire an existing at-will employee and then re-hire the employee the next day with a covenant not to compete.

Completing its survey of the law, the Court concluded that in the area of "post-employment restrictive covenants . . . the Hawaii Supreme Court would not require additional consideration beyond continuing at-will employment."

Employers should remain cautious: While well-reasoned and well-supported by case analysis, this case is simply an informed guess by a federal judge as to what the Hawaii Supreme Court might do if given the same question. The Hawaii Supreme Court is not bound to give this opinion any deference. As the federal judge noted, "It is true, of course, that Hawaii does not blindly follow majority rules in all areas of the law."

Jackson Lewis attorneys are available to answer inquiries regarding this case and other workplace developments.

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