

Continued At-Will Employment Sufficient Consideration for Restrictive Covenants, Connecticut Court Holds

By Justin E. Theriault

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Continued at-will employment can be sufficient consideration for an employee's restrictive covenant agreement, the Connecticut Appellate Court has held. *Schimenti Construction Company, LLC v. Schimenti*, No. AC44274 (Jan. 17, 2023).

Until now, Connecticut law was unclear whether continued at-will employment constituted sufficient consideration for restrictive covenants, such as non-competes, non-solicits, or non-disclosure agreements, with various trial court decisions in Connecticut coming down on opposite sides of the question.

Background

It is a basic principle of contract law that, to be enforceable, an agreement must entail an exchange of consideration between the parties.

This case involved an employee who entered into a 2014 nondisclosure agreement, which included a two-year non-competition provision, as a condition of his continued at-will employment. In 2018, the employee resigned from employment. The company then brought a lawsuit claiming that the employee breached the contractual obligations he owed to the company under the nondisclosure agreement.

Discovery was conducted and the employee filed a motion for summary judgment. In granting the employee's motion for summary judgment, the trial court held that the employee's mere continued at-will employment was insufficient consideration to create an enforceable agreement.

The employer appealed the decision to the Connecticut Appellate Court, which reversed the trial court's holding.

Decision of Connecticut Appellate Court

In sustaining the validity of the restrictive covenant agreement, the Connecticut Appellate Court distinguished the cases relied upon by the trial court, instead finding that the 1934 decision of the Connecticut Supreme Court in *Roessler v. Burwell* (119 Conn. 289) was binding precedent that continued at-will employment is sufficient consideration for a restrictive covenant.

Roessler similarly involved an employee who executed a non-solicitation covenant in exchange for continued employment and allegedly violated his non-solicitation obligations after resigning his employment several years later. The former employer brought suit, and the trial court in *Roessler* found the restrictive covenant agreement to be enforceable, entering an injunction restraining the former employee from further solicitation of the employer's customers. On appeal, the Connecticut Supreme Court affirmed the trial court's decision, holding, "The underlying purpose of the [former employee] in entering into the agreement was to continue thereafter in the employment of the [employer] at a mutually agreeable salary; the benefit offered him was such a continuance, in return for which the [employer] was to receive his services and the benefit of the restrictive covenant in the agreement."

The Appellate Court in *Schimenti* held that, at minimum, a genuine issue of material fact existed as to whether there was sufficient consideration for the employee's nondisclosure agreement. The case was remanded to the trial court for further proceedings, with the Appellate Court noting the employee would have the opportunity to present evidence at trial that there was no connection between the nondisclosure agreement and his continued employment, "but, if connected, continued employment can be sufficient consideration for a restrictive covenant."

In reaching its holding, the Appellate Court noted a split in decisions on the question of continued employment as consideration from Connecticut trial court judges, observing that those finding continued at-will employment to be insufficient consideration generally either failed to address the decision in *Roessler* or attempted to distinguish the facts of *Roessler* from the case before them.

Meet the Author



[Justin E. Theriault](#)

Principal
Hartford
860-331-2588
Email

Practices

Restrictive Covenants, Trade
Secrets and Unfair Competition

The *Schimenti* decision is a major development providing long-overdue clarity for employers in Connecticut that wish to use continued at-will employment as consideration for restrictive covenants with their current employees.

Numerous questions may remain after this decision, including whether the subsequent length of continued at-will employment might also affect the consideration analysis.

Consideration is not the only requirement for a restrictive covenant agreement to be enforceable. Employers who wish to require employees to enter into restrictive covenants would still be well-advised to consult with employment law counsel before proceeding to ensure that such agreements are enforceable.

Jackson Lewis attorneys are available to discuss the *Schimenti* decision and to assist with reviewing and revising restrictive covenant agreements.

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