March 2012 Vol. 49, No. 5

ILLINOIS STATE BAR ASSOCIATION

Labor & Employment Law

The newsletter of the Illinois State Bar Association's Section on Labor & Employment Law

Drafting enforceable restrictions on recruiting employees

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Employment and business-to-business contracts often restrict soliciting or hiring a company's employees for a time. Court decisions applying Illinois law recognize that maintaining a stable workforce is a legitimate business interest,[1] but reject in most circumstances blanket restrictions on recruiting or hiring any employees for any business. For example, in *Hay Group v. Bassik,* 2005 U.S. Dist. LEXIS 22095 * 22, 2005 WL 2420415 * 7 (N.D. Ill. Sept. 29, 2005), the court refused to enforce an employment agreement's restriction on "soliciting or otherwise directly or indirectly attempting to induce any employee of Hay Group, Inc. or its affiliates to terminate his or her employment." Similarly in *YCA, L.L.C. v. Berry,* 2004 U.S. Dist. LEXIS 8129, 2004 WL 1093385 * 18 (N.D. Ill. May 7, 2004), while a recruitment restriction served a legitimate interest of protecting confidential information from potential competitors, it was overbroad because it prohibited recruiting or hiring any employee for any business.

The same standards apply in business-to-business contracts. In *Pactiv Corp v. Menasha Corp*., 261 F.Supp. 2d 1009 (N.D. Ill. 2003), the parties signed a confidentiality agreement that governed the prospective buyer's use of information that would be provided to it for evaluating the potential purchase of a Pactiv subsidiary. A clause in the agreement restricted the prospective buyer for three years from soliciting, hiring, or inducing any "management employees" to terminate employment. While acknowledging that Pactiv had a legitimate interest in preventing the potential purchaser from using its information and access to hire away personnel, the court held the restriction fatally overbroad. The restriction applied not just to the subsidiary, but also to all present and future management employees of Pactiv and its affiliates throughout the world, regardless of what knowledge they had concerning the subsidiary. 261 F. Supp. 2d at 1014-15.

However, blanket recruitment restrictions have been found reasonable based on particular facts.[2] The leading case is *Arpac Corp. v. Murray,* 226 Ill.App.3d 65, 589 N.E.2d 640 (1st Dist. 1992), in which a former vice president of marketing and sales had a two-year restriction on soliciting or inducing "any employees" to terminate employment with the plaintiff. 226 Ill.App.3d at 69, 589 N.E.2d at 645. The appellate court wrote broadly that the restriction was "reasonably calculated to protect Arpac's interest in maintaining a stable work force." 226 Ill.App.3d at 76, 589 N.E.2d at 650.

While the *Arpac* court did not discuss why the blanket restriction was reasonable, the implicit factors were used to distinguish the one in *Pampered Chef v. Alexanian*, 2011 U.S. Dist. LEXIS 76135 (N.D. Ill. July 14, 2011). Pampered Chef maintained a direct sales force of 58,000 independent contractors who sold kitchenware at home parties. Successful sales consultants became "Directors," who were restricted from soliciting sales consultants to join any other direct sales company. In distinguishing *Arpac*, the court noted that the restriction there was justified by the employees' specialized skills and role in selecting the configurations of shrink-wrapping machines to meet each customer's needs. 2011 U.S. Dist. LEXIS 76135 * 41. Those employees worked in a highly specialized industry, in which a few manufacturers competed for the business of a small number of customers.

Similar rationales have applied in other cases. In *Integrated Genomics, Inc. v. Kyrpides.* 2010 WL 375672 * 10 (N.D. Ill., Jan. 2, 2010), the court upheld a blanket recruiting restriction on a former employee where the employees were "world experts in microbial genomic analysis and metabolic reconstruction," the loss of whom, given the limited pool of competent replacements, would have significantly detrimental impact on employer. In *Malone v. CORT Furniture Corp.*, 2002 WL 1874819 * 1 (N.D. Ill., Aug. 13, 2002), the court enforced an 18-month ban on recruiting employees where the small company's loss of even small number of employees, who performed multiple key functions, would harm the company.

Although dealing with a different type of restriction in *Freund v. E.D. & F. Man Int'l, Inc.*, 199 F.3d 382, 385 (7th Cir. 1999), the Seventh Circuit summarized Illinois law as follows: "[U] under Illinois law an employer who has made a substantial enough investment in the human capital of its employees to enforce a covenant by his employees not to compete with him (for a reasonable time and within a reasonable geographical and product space) can also enforce a promise by another employer not to hire away these employees, provided the contract does not unreasonably restrain competition between the two employers…"

A blanket restriction may be justified by unusual factors such as a company's small size or the nature of the workforce or industry. However, unless those justifications are apparent, a recruitment restriction should be limited to competitive employment of those having confidential information or with whom the restricted party holds a recruiting

advantage. Examples of recruiting advantages are relationships with the employees, knowledge of a company's confidential information, and knowledge of an employee's competencies. Of course, the restriction should also be reasonably limited in geographic and temporal scope.

The restriction's scope should be narrower for lower level employees than for senior management, who presumably have more confidential information and sway over wider employee groups. For employees other than senior management, the restriction may need to be limited to subordinates, others with whom the restricted employee works, and senior manager. Even a restriction on recruiting employees at the same level in a company may be too broad in a large company with separate business units and operations in many locations.

To remain well-tailored as an employee moves within the organization, a restriction should generically describe the restricted groups. That way the restriction can automatically transfer to different groups as the employee moves within the company. Depending on the company's size, the restricted groups could be senior management, those in the employee's direct chain of command, and those who worked with the employee within a year or two preceding the employee's termination. *See Centimark Corp. v. Vitek*, 2010 U.S. Dist. LEXIS 138302 * 23, 2010 WL 5490662 * 8 (N.D. Ill. Dec. 29, 2010) (no hiring of senior management held reasonable); *Zep, Inc. v. First Aid Corp.*, 2010 U.S. Dist. LEXIS 26798 * 34, 2010 WL 1195094 * 12 (N.D. Ill. March 19, 2010) (restriction on recruiting for competitors employees who worked concurrently with defendants not unenforceable as a matter of law).

The agreement may also include multiple levels of restricted groups, going from broader to narrower, which would enable a court to "blue pencil" the broader restrictions are deemed unreasonable. All agreements should include a direction for the court to modify an unreasonable restriction and enforce it to the fullest extent found reasonable. That direction saved a facially unreasonable restriction in *YCA*, which the court modified and enforced to prohibit recruiting employees who potentially possess confidential information to work for a competitor. 2004 WL 1093385 * 18.

Finally, in the business-to-business context, a restriction should focus on the extent to which the relationship, and the information shared in the relationship, gives one party an advantage over others in recruiting the other's employees. The restriction should apply to groups of employees whom the party either (a) has access, (b) gained information about that could be used to compete, or (c) gained confidential information that could be used to sway an employee to depart. ■

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1. While the court in *Unisource Worldwide, Inc. v. Carrara*, 244 F. Supp. 2d 977, 983 (C.D. Ill. 2003), rejected that recruitment restrictions serve a legitimate business interest, its rationale is doubtful in light of the Illinois supreme court decisions in *H & M Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc*., 209 Ill.2d 52, 805 N.E.2d 1177 (2004), which recognized that restricting customers from hiring an employee leasing company's drivers protected a legitimate interest, and *Reliable Fire Equip. Co. v. Arredondo*, 405 Ill.App.3d 708, 940 N.E.2d 153 (2011), which expanded the legitimate business interest factor in noncompetition restrictions. Citing *H & M*, the court in *Asta, L.L.C. v. Telezygology, Inc.,* 629 F. Supp. 2d 837 (N.D. Ill. 2009), enforced a contractual requirement for defendant to pay half the first-year salary if it hired any salesperson whom plaintiff provided as a contractor.

2. In *Frank B. Hall & Co., Inc. v. Payseur*, 78 Ill. App.3d 230, 232, 396 N.E.2d 1246, 1248 (1st Dist. 1979), the court upheld a restriction on soliciting any customers and employees. However, the court did not discuss the employee nonsolicitation aspect. Similarly in *Torrence v. Hewitt Associates*, 143 Ill.App.3d 520, 493 N.E.2d 74 (1st Dist. 1986), the court upheld without discussion a restriction on a former in-house counsel hiring Hewitt employees.