

Employment Alert

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Appellate Court Rejects "Legitimate Business Interest" Test When Deciding Whether Restrictive Covenant Is Enforceable

Although the Illinois Supreme Court has never explicitly addressed the issue, appellate courts in the state historically have required an employer to prove the existence of a legitimate business interest in order to enforce a restrictive covenant. The so-called "legitimate business interest" test states that an employer can restrict an employee from working for a competitor only where the restriction furthers an employer's legitimate business interest such as protecting itself from unfair competition. Recently, an appellate court for the first time expressly **rejected** the "legitimate business interest" test as it relates to the enforceability of a time and territory restrictive covenant agreement *Sunbelt Rentals, Inc. v. Ehlers III*, No. 4-09-0290, 2009 WL 3052369 (4th Dist., Sep. 23, 2009). The employer in that case was in the business of renting and selling industrial equipment, and it sought to enforce a restrictive covenant against its former sales representative, Neil Ehlers, which prohibited Ehlers from working for any competitor for a one year period within a 50 mile radius of Sunbelt Rentals' facilities. The trial court determined that this time and territory restrictive covenant agreement was enforceable. Ehlers appealed, arguing that the trial court failed to follow controlling precedent, specifically contending that the court failed to apply the requisite "legitimate business interest" test.

On appeal, the Fourth District reviewed the origins of the "legitimate business interest" test and determined that it had been created by the appellate courts "out of whole cloth." *Sunbelt Rentals*, at*5. The court noted that, in the state Supreme Court's most recent decision regarding restrictive covenants, *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52 (Ill. 2006), a non-compete was enforced without ever addressing the "legitimate business interest" test. Instead, the justices relied solely on the fact that the agreement did not run contrary to public policy and that the limitations as to time and territory were not unreasonable.

The Fourth District seized upon the state's highest court's omission in *Mohanty* of the "legitimate business interest" test, noting that the lesson of the Supreme Court precedent in that instance is that when courts are "presented with the issue of whether a restrictive covenant should be enforced, [they] should evaluate only the time-and-territory restrictions contained therein." The Fourth District concluded that if the restrictions are not unreasonable, then a non-competition agreement should be enforced without conducting additional analysis regarding the "legitimate business test" because "that test constitutes nothing more than a judicial gloss incorrectly applied to this area of law by the appellate courts."

The lawsuit settled after the appellate court's decision so there will be no appeal to the Illinois Supreme Court. Therefore, for employers operating in central Illinois, within the jurisdiction of the Fourth District, the *Sunbelt Rentals* decision could make it easier to enforce non-compete agreements which have time and territory restrictions.

One final point, as it was not an issue in this case, the *Sunbelt Rentals* court did not address whether the "legitimate business interest" requirement would still be part of the determination of the enforceability of an *activities* restrictive covenant. An activities restrictive covenant is one where an employer through agreement limits an employee from selling to or servicing customers or potential customers of the company for a period of time. This type of non-compete does not typically have any territory restriction, and instead prohibits contact with certain customers regardless of where they are located. As an activities covenant is somewhat different in nature, employers should be aware that subsequent courts, even in the Fourth Appellate District, may not apply the *Sunbelt Rentals* rationale to these types of restrictive covenants.

For more information, please contact Paul Garry, Bruce Meckler or any other MBT labor and employment lawyer at (312) 474-7900.

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