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THE JOB DESCRIPTION

Supreme Court Revisits Title VII, Issues Pro-Employer Decisions

The United States Supreme Court recently handed down rulings in two cases involving employment discrimination claims under Title VII of the Civil Rights Act of 1964, each of which resulted in a five-to-four decision for the employer. First, in *University of Texas Southwestern Medical Center v. Nassar*, a University faculty member was offered a physician position at an affiliated Hospital in accordance with its agreement to hire University faculty members to fill staff physician posts. After he left the University faculty because his supervisor had allegedly harassed him on account of his religion and ethnic heritage, the Hospital withdrew his job offer, and he brought a retaliation claim under Title VII. The Hospital argued that it rescinded the offer not because of his complaints of harassment, but because he was no longer a member of the University's faculty, and extending him an offer of permanent employment would have violated the Hospital's agreement with the University.

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The Cavanaugh Law Firm, LLC is committed to your company's success. We are available to provide you knowledgeable advice on the full range of labor and employment law issues and to defend your company and its managers in lawsuits and agency proceedings. If you have any questions about the contents of this newsletter or about any issue affecting your company, please contact us.

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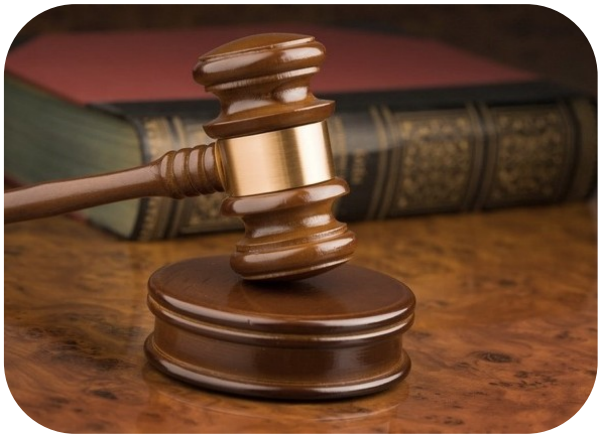
The Court held for the Hospital and, in an opinion written by Justice Kennedy, concluded that to prevail on a retaliation claim under Title VII, a plaintiff must prove that "but for" his or her protected activity, the employer would not have taken the alleged adverse action against the plaintiff. Merely proving that the protected activity was one motivating factor will not suffice. Thus, the Court affirmed that a plaintiff must prove a higher causation standard in retaliation cases than in discrimination cases under Title VII. The Court also raised a concern that lowering the causation standard would likely increase the already-rising number of retaliation claims.

In the second case, *Vance v. Ball State University*, the Court answered a question left open by two cases it decided in 1998, *Burlington Industries, Inc. v. Ellerth* and *Faragher v. Boca Raton*, which both distinguished between discrimination by a "supervisor" and a coworker, but did not specifically define the term "supervisor." In an opinion written by Justice Alito, the Court held that "an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim, i.e. to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."

The Court reasoned that because "supervisor" has varying meanings, and Title VII contains no reference to the term, it must define it in the context of *Ellerth* and *Faragher*. The Court noted that in *Ellerth*, the alleged harasser was clearly a supervisor because he hired the victim and promoted her. In *Vance*, the petitioner had alleged that her supervisor harassed and discriminated against her on the basis of her race, which, under *Ellerth* and *Faragher*, would render her employer vicariously liable. Though the job description of the alleged harasser contained supervisory duties, the Court found no evidence in the record to indicate that she actually supervised the petitioner's work on a daily basis.

Dissenting, Justice Ginsburg reasoned that this decision wrongfully "strikes from the supervisory category employees who control the day-to-day schedules and assignments of others, confining the category of those formally empowered to take tangible employment actions," and argued that the Court should have applied the EEOC's definition of a supervisor as "any employee with authority to undertake or recommend tangible employment decisions or with authority to direct [another] employee's daily work activities."

These pro-employer decisions will undoubtedly change the way future plaintiffs and their lawyers approach claims under Title VII. These rulings will make it harder for plaintiffs to prove their cases, but perhaps more importantly, will provide judges greater authority to prevent the case from getting to a jury in the first place.



Missouri Court Rules in Favor of Employer in Non-Compete Dispute

The Missouri Court of Appeals has handed down an opinion sure to hinder employee efforts when violating their non-compete agreements. The unanimous decision in *Jumbosack Corp. v. Buyck* reversed the trial court's grant of summary judgment in favor of the employee, Buyck, and remanded the case back to the trial court. The court first rejected Buyck's assertion that continued employment alone is not enough to be considered when a non-compete is made after employment has begun. They instead affirmed previous rulings and held that an employee's continued employment and continued access to the company's confidential information and customer relationships serve as adequate consideration for a non-compete signed after employment began.

Non-Compete News: Illinois Appellate Court Finds Non-Compete Unenforceable; Continued Employment of at Least Two Years Required

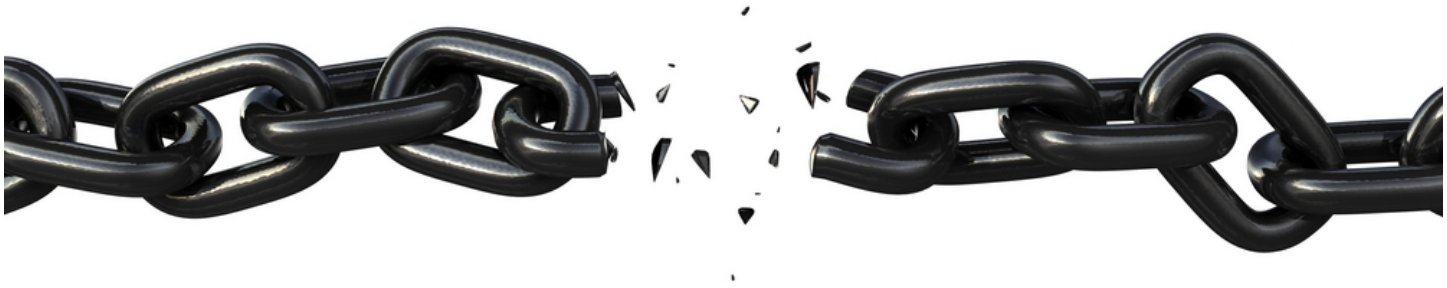
The Illinois Appellate Court recently found a non-compete agreement unenforceable due to lack of adequate consideration. Although this is not the first time an Illinois court has held that there must be at least two years of continued employment to constitute adequate consideration to support a restrictive covenant, the ruling in this case was remarkable because:

- The employee signed the restrictive covenant when he began employment. However, the court rejected the employer's argument that the offer of employment was itself adequate consideration;
- The restrictive covenant was the product of negotiations between the employee and employer, and included a proviso that the non-solicitation and non-competition provisions would not apply if the employee was terminated without cause during the first year of his employment. Yet the court found this protection was insufficient consideration; and
- The employee voluntarily resigned after three months' employment; however the court relied on prior decisions holding that an employee's voluntary resignation, as opposed to involuntary termination, makes no difference to the consideration analysis.

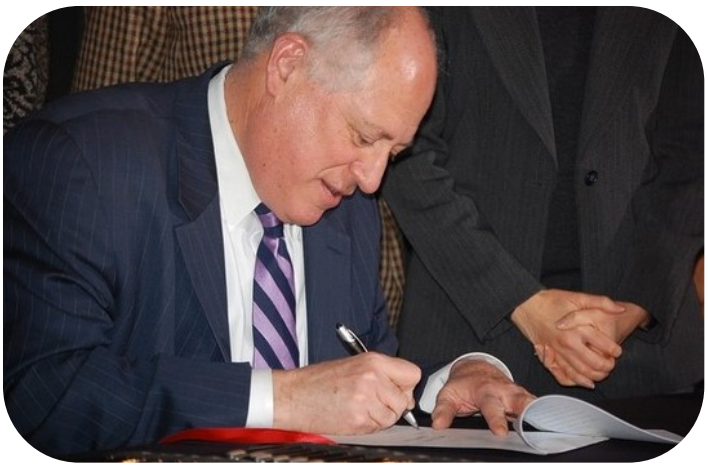
This important decision, *Fifield v. Premier Dealer Services, Inc.*, brings into sharp focus the hurdles an Illinois employer will face when attempting to enforce a restrictive covenant. The decision illustrates that if the only consideration provided by the employer is employment (either a new job offer or continued employment), then Illinois courts will not enforce the restrictive covenant until at least two years' continuous employment have transpired. One alternative approach would be to offer the employee something of value (other than employment), such as a cash bonus or stock award, in exchange for signing the non-compete.

New Illinois Laws to Help Ex-Offenders Get Jobs

Illinois Governor Pat Quinn recently signed several bills into law to encourage employers to hire applicants with criminal convictions. One measure increases a tax credit for employers who hire qualified ex-offenders to $1,500 per employee. It previously was capped at $600. Employers may take the credit for up to five years. It applies to any ex-offender hired within three years of release from prison.



Illinois Governor Signs Two New Independent Contractor Laws To Deter Misclassification



A majority of states have enacted legislation in the past five years that seek to curtail independent contractor misclassification in particular industries or across-the-board. Governor Pat Quinn of Illinois recently signed two new laws intended to curtail misclassification of employees as independent contractors. Both laws amend Illinois' Employee Classification Act, which applies to the construction industry. That Act was one of the first in the country to crack down on independent contractor misclassification and the underground economy in the construction industry. The first new amendment to the Act adds the word "individual" to the definition of "Contractor," which includes general contractors and subcontractors. It also imposes a new section entitled "Individual Liability," whereby any officer or agent of a corporation who knowingly permits a construction employer to misclassify an individual, sole proprietorship, or partnership "may be held individually liable for all violations and penalties assessed under this Act."

The modified civil penalties are $1,000 per violation for a first offense and $2,000 for each repeated violation. The Act specifically provides that it is a separate violation for each individual misclassified on each separate day. For "willful" violations, the Act includes a double damages provision as well as a clause permitting the assessment of punitive damages equal to the amount of double damages. Willful violations are also misdemeanors, and elevate to felonies if repeated in a five-year period.

The second new amendment to the Employee Misclassification Act imposes a new reporting requirement upon construction employers, which must soon report annually all payments to individuals, sole proprietorships, and partnerships "performing construction services … if the recipient of payment is not classified as an employee." Such reports shall include the individual's name, address, and "business identification number" or "federal employer identification number" as well as the amount paid to such recipients. The names of the reporting contractor and recipients are available to the public upon request under the state's Freedom of Information Act.

All Illinois businesses, non-profit organizations, and governments in Illinois that classify workers as independent contractors are at risk of misclassification liability if they do not structure and document their independent contractor relationships in accordance with Illinois law.

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