Egblc Legal Report

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Courts continue to perplex employers regarding non-compete agreements

by Douglas E. Lee

Illinois state and federal courts are sending increasingly confusing messages to employers seeking to enforce covenants not to compete against former employees. As a result, employers hoping to someday enforce restrictive covenants should enter into them with care.

Just three years ago, in *Fifield v. Premier Dealer Services*, an Illinois appellate court seemed to bring some clarity to the issue, holding that an employer could not enforce a covenant not to compete that was part of an at-will employment relationship unless the employer either provided the employee some additional consideration for agreeing to the covenant or employed the employee for at least two years. Employers were not thrilled with this decision, but most appreciated that the court seemed to be drawing a bright-line rule where one had not before existed.

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Kennedy joins EGBLC

EGBLC recently welcomed Courtney Kennedy as its newest attorney.

Mrs. Kennedy graduated from the Northern Illinois University College of Law in December 2015 and passed the Illinois bar in April 2016. In law school (which she completed in two and one-half years rather than the standard three), Mrs. Kennedy served as Vice President of the Environmental Law Society, was a member of the Christian Legal Society and served as a mentor for the Women's Law Caucus. She also tutored Civil Procedure and mentored first-year students. During her last semester, Mrs. Kennedy clerked for the judges in Ogle County.

Mrs. Kennedy graduated *magna cum laude* from Ashford University in 2013, majoring in social sciences and minoring in criminal justice. Mrs. Kennedy completed her undergraduate studies in just three years.

At EGBLC, Mrs. Kennedy will work in all areas of the law but focus on general litigation, bankruptcy and real estate.

Inside

New salary threshold will challenge employers

by Douglas E. Lee

Barring the passage of legislation and the override of a presidential veto, new U.S. Department of Labor rules increasing the salary threshold for exemptions from overtime will take effect Dec. 1, 2016.

In the works for more than a year, the new rules, announced May 18, 2016, provide that only those salaried workers earning more than $47,476 a year are exempt from the requirement that an employer pay time-and-a-half when an employee works more than 40 hours during a week. The current salary threshold, set in 2004, is $23,660 annually.

The new rules apply to those who are exempt from the overtime requirements under the executive, administrative and professional exemptions. Therefore, almost all salaried employees – regardless of their job duties – are affected by the new rule.

In a small concession to employers, the new rules allow employers to use non-dis-

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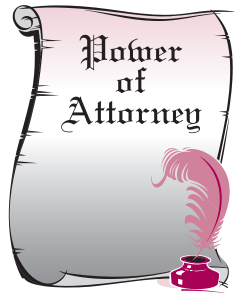
Powers of attorney serve several important purposes

by Gary R. Gehlbach



Traditionally, planning for a person's estate meant preparing an appropriate last will and testament and sometimes a trust. Powers of attorney were used rather infrequently, the historic law being that a power of attorney only remained effective until the person giving the power of attorney was incompetent. The term "incompetent" became somewhat of a pejorative term and was changed to "disabled" or "incapacitated." Further, most states' laws only provided for powers of attorney for financial matters and did not allow for the delegation of medical or healthcare decisions.

As our life expectancies expanded, powers of attorney became almost essential. Most of us will be fortunate to live longer than our parents or grandparents. However, the longer we live the more likely we will encounter some form of dementia or other debilitating ailment. Having legal documents in place to designate someone to make necessary and significant decisions for us while we are living is absolutely essential and should be part of every estate plan.

An effective estate plan today almost always includes powers of attorney, both for financial matters as well as healthcare decisions.

In Illinois, as well as in most other states, the historic limitations on powers of attorney changed dramatically in the 1980s. For example, in 1983 Illinois adopted a "living will" statute and four years later substantially revised its power of attorney law to provide that powers of attorney may last as long as the person giving the power is living and to create prototype forms, referred to as the "statutory forms." These include a power of attorney for healthcare and a power of attorney for financial matters.

The statutory form for property matters is actually quite good, although somewhat limited. It should, however, almost never be used without some modifications, especially in terms of the specific powers that are given to the designated agent. Banks, brokerage companies, title companies and others who routinely rely on powers of attorney occasionally require that a financial power of attorney include some specificity regarding the authority of the agent. A well-drafted financial power of attorney therefore should include a significant and specific list of additional powers tailored to the client's needs. Over the years, EGBLC has developed a list of approximately two dozen additional powers that are used selectively, depending on the particular client's circumstances.

As is true with the statutory form for property matters, the healthcare form has gone through a number of iterations since first signed into law in 1987, with the most recent form taking effect Jan. 1, 2016.

A key aspect of the newest healthcare form is indicating when it becomes effective. Three choices are given in the form: first, that it would not be effective until the principal (the person granting the power of attorney) is determined by a physician to be incapacitated; second, that the power of attorney would not be effective until the principal is incapacitated, but in the meantime the agent would have authority to consult with the principal's healthcare providers to determine whether the principal is incapacitated and finally, a statement that the power of attorney is effective on signing, although the principal can still make his or her own decisions. At EGBLC, we in most situations prefer the power of attorney to be effective on signing, particularly if the principal totally trusts the person whom he or she is designating as agent. By letting the power of attorney be effective on signing, the family avoids the necessity of having a physician examine the principal, prepare a written report and deliver it to the agent.

The current statutory healthcare form, as modified and used by EGLBC, includes other designations as well, including choices for the principal in the event of an end-of-life situation.

Interestingly, the living will statute, signed in 1983, has not been amended. Essentially, a living will is a declaration by someone that, if the person has an incurable and irreversible sickness, illness or disease and would die except for death-delaying procedures, the death-delaying procedures should be withdrawn or withheld. Actual decision-making in that situation, however, is generally much more nuanced and not simply a matter of determining whether to withdraw or withhold procedures. Instead, many other factors are now identified and important, not the least of which are the quality of one's life and the prognosis for improvement. Therefore, for most estate planning practitioners in Illinois, the living will form is simply ignored. Moreover, there are legal inconsistencies between the Illinois living will and the Illinois healthcare power of attorney statutes. To the extent they are inconsistent, the healthcare power of attorney controls.

Compounding the issue of whether to have both a living will and a healthcare power of attorney is a 1991 federal law. This law requires that if a person is admitted to a hospital or other care facility on an overnight basis, that hospital or care facility must provide the person with the statutory forms of living will and healthcare power of attorney. We advise clients to have a well-drafted healthcare power of attorney and to provide the hospital or care facility with a copy of that document in lieu of a living will or the unaltered statutory healthcare form.

Covenants . . .

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In 2015, *McInnis v. OAG Motorcycle Ventures* gave another Illinois appellate court a chance to solidify that rule. In *McInnis*, a motorcycle salesman left his employer to join a competitor, only to change his mind a day later and ask the employer to rehire him. The employer agreed, but only on the condition that the employee sign a restrictive covenant that would prevent him from working for any competitor within 25 miles for 18 months.

A year and a half later, the employee resigned to join the same competitor. The employee sued, asking the court to find the restrictive covenant unenforceable. The trial court ruled for the employee, saying the covenant could not be enforced because the employee had not worked for two years after signing it.

On appeal, the appellate court agreed, holding that the employer's decision to rehire the employee did not constitute additional consideration to support the covenant and that the two-year rule announced in *Fifield* prevented the employer from enforcing the covenant. The court, however, did not offer any guidance as to what the employer should have offered (in addition to the job) to be able to enforce the covenant short of the two-year requirement.

Just six months later, an Illinois federal court rejected the notion that the court in *Fifield* announced a bright-line two-year rule and instead held that the length of time an employee works after signing a covenant is only one factor to consider when deciding whether to enforce the covenant.

In *Traffic Tech v. Kreiter*, the court enforced a covenant not to compete even though the employee had worked for only ten months, saying the totality of the circumstances supported the employer's right to enforce the covenant.

Employers, however, could not enjoy the holding in *Traffic Tech* long. In *Assured Partners v. Schmitt*, an Illinois appellate court refused to enforce a restrictive covenant, not because of the two-year rule but because it found the covenant's prohibitions unfair and unreasonable.

In *Schmitt*, the employee brokered malpractice insurance for lawyers. During his employment, the employee signed a senior management agreement that gave him a small ownership stake in the employer but that, among other things, prohibited him from engaging in any business that related to professional liability insurance anywhere in the U.S. for up to four years.

After a dispute with the employer, the employee resigned and began actively soliciting the clients he serviced while working for the employer. In the ensuing litigation, the employee argued that the covenant was too broad because it was not limited to legal malpractice insurance and not limited to the geographic area in which he worked.

Not surprisingly, the trial and appellate courts agreed that the covenant was too broad. To the surprise of many employment lawyers, however, the courts refused to modify the covenant so that it more reasonably prohibited the employee from soliciting his former clients.

While acknowledging Illinois courts' long history of judicially modifying restrictive covenants, the appellate court in *Schmitt* refused to modify this covenant, saying it was too unfair to justify limiting modifications. As a result, the employee was left free to compete against his former employer.

To the extent lessons can be gleaned from these recent cases, they are these:

- An employer hoping to enforce a covenant not to compete should support the covenant with stated consideration – either an agreement to terminate the employment relationship only for cause or a bonus or other financial compensation that is being paid in direct exchange for the employee's agreement to the restrictive covenant.
- The covenant should be drawn as narrowly as possible so that it restricts the employee only from soliciting the employer's customers or clients within that portion of the employer's market in which the employee had been active.

It is possible, of course, that a court might enforce a restrictive covenant slightly broader than the one these lessons suggest, and the courts consistently emphasize that covenants not to compete must be judged on a case-by-case basis. An employer considering a restrictive covenant therefore is wise to seek legal assistance in drafting it.

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cretionary bonuses and incentive payments, such as commissions, to satisfy up to 10 percent of the salary threshold.

The new rules also change the threshold for the exemption for "highly compensated" employees. Under this exemption, an employee who is "highly compensated" is exempt from the overtime rule, as long as the employee performs at least one job function that involves management duties or the exercise of discretion. Currently, that threshold is $100,000 a year. Under the new rule, the threshold will rise to $134,004.

Under the new rules, the Department will adjust the thresholds every three years to maintain the standard salary level at the 40th percentile of full-time salaried workers in the lowest-wage census region.

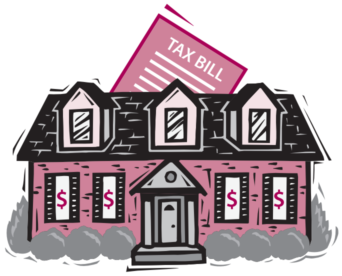
While considerable disagreement exists about whether, on a national level, the new rules will help or harm employees who currently earn less than $47,476 annually, each employer who pays salaries will need to determine how the new rules affect the way it compensates its employees.

Bankruptcy decision creates doubt in real estate tax purchasers

by Megan G. Heeg

In a decision that could cause alarm among Illinois real estate tax buyers, a federal appellate court earlier this year held that a debtor in bankruptcy can sue a tax buyer to recover the value of the debtor's interest in the property.

In the case, a tax buyer in Will County, Illinois, paid more than $4,000 to purchase delinquent real estate taxes. When the taxes were not timely redeemed, the buyer obtained a tax deed to the property and then sold the property for $50,000. Almost two years later, the owner who lost the home filed for bankruptcy and in the bankruptcy sought to recover from the tax buyer his $15,000 homestead interest, claiming the tax sale constituted a fraudulent transfer under



bankruptcy law.

After conflicting decisions below, the U.S. Court of Appeals for the Seventh Circuit held that, because Illinois' real estate tax sale process does not involve competitive bidding, the transfer to the tax buyer was not for a reasonably equivalent value and therefore was a fraudulent transfer. The court then ordered the tax buyer to pay the debtor the $15,000 value of the debtor's Illinois homestead exemption claim.

At this time, the ripple effects of this case are unknown. For example, it is not known whether the recovery in all cases is limited to the amount of the homestead exemption or whether a bankruptcy trustee making a similar argument could recover more than this amount. Also, it is not known how a court would approach a case in which the person acquiring the property from the tax buyer received it as a gift or otherwise did not pay fair value for it. While the *bona fide* purchaser defense protected the ultimate purchaser in the Will County case, an owner who does not pay fair value might not enjoy that defense and be subject to liability.

Given these uncertainties and the risks this court decision has injected into the Illinois tax buying process, many predict that the General Assembly will act to ensure that the process satisfies bankruptcy law requirements.

In Print and At the Podium

Mr. Gehlbach and **Mrs. Considine** are serving as members of the Dixon One Task Force, with **Mr. Gehlbach** chairing the group . . . **Mrs. Heeg** recently spoke at the Winnebago County Bar Association's annual bankruptcy seminar, speaking on the issue of fraudulent transfers from the bankruptcy trustee's perspective . . . **Mr. Lee** was named chair of the finance and strategic planning committees of the board of directors of KSB Hospital . . . In April, **Mr. Gehlbach** presented a webinar to Illinois attorneys on drafting effective powers of attorney . . . **Mrs. Considine** served on the committee of local lawyers and judges that drafted new family law forms for use in Lee and Ogle counties, in response to Illinois' new Marriage and Dissolution of Marriage Act . . . As president of the Lee County Bar Association, **Mr. Lee** organized a debate among the three candidates for Lee County State's Attorney . . . **Mr. Gehlbach** recently was appointed chair of the Illinois State Bar Association's Trusts and Estates Section Council . . . **Mr. Gehlbach** this month spoke on trusts to a Polo community group.

Deals and Decisions

Mrs. Heeg recently settled a case against a former corporate officer in which the former officer agreed to pay a bankruptcy estate over $144,000 that the officer had fraudulently transferred out of the corporation just before he put the corporation into bankruptcy . . . **Mr. Lee** this spring received favorable rulings in trials for three separate clients . . . **Mrs. Heeg** continues to use the Illinois laws to collect payment on client's judgments and to represent creditors in bankruptcy, allowing creditors to recover assets and/or to receive payment on their claims . . . **Mr. Lee** recently assisted a client in receiving a favorable settlement in a dispute over a construction contract.

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