An Illinois federal judge’s recent decision continues a trend toward supporting a “totality of the circumstances” approach to the enforcement of restrictive covenants.

In Stericycle, Inc. v. Simota, et al., 2017 WL 4742197, the defendants moved to dismiss plaintiff’s breach of contract claims arguing that 13 months of continued employment was inadequate consideration to enforce certain restrictive covenants. Following the majority of federal judges that have considered this issue in Illinois, Judge John J. Tharp found that if confronted with the issue, the Illinois Supreme Court would reject a bright line rule of two years of continued employment and apply a fact-specific approach in assessing consideration. Using this approach, Judge Tharp found that 13 months of continued employment was adequate consideration to support the enforcement of the restrictive covenants.

In January 2015, after acquiring the company for which defendants worked, the defendants entered into confidentiality and non-solicitation agreements with Stericycle. Their agreements prohibited the defendants from disclosing confidential information to third parties or soliciting Stericycle customers or employees for a period of 12 months following the termination of their employment. The consideration offered to the employees for entering into the agreements was “employment.”

The defendants worked for Stericycle for approximately 13 months, resigned and began working for one of Stericycle’s competitors in positions similar to those they had held at Stericycle. In addition, Stericycle alleged that the defendants took confidential information, including information regarding pricing and customers, informed Stericycle customers about their move and solicited at least one other Stericycle employee to join their new employer.

When Stericycle filed suit, defendants moved to dismiss the breach of contract count, arguing that 13 months of continued employment is insufficient as a matter of law to serve as consideration for a restrictive covenant. Focusing on the fact that the defendants had resigned after 13 months of
employment, Judge Tharp found that there was sufficient consideration to enforce the agreements. The court recognized that Illinois courts require that consideration based on at-will employment continue for a “substantial period” after an employee signs a restrictive covenant, but determined that the Illinois Supreme Court would reject a bright-line two-year rule and apply a fact-specific approach in assessing consideration.

In reaching this conclusion, the court relied on several Illinois appellate court opinions in which those courts looked to the *totality of the circumstances* in determining the issue of consideration. The court recognized that some Illinois courts have generally held that two years or more of continued employment is adequate consideration, but that just because two years or more is sufficient, that does not make it necessary. While the court acknowledged the requirement of a substantial period of continued employment to prevent an employer from locking an at-will employee into a restrictive covenant and then immediately terminating the employee, the court also recognized that employment for a lesser period of time could alleviate that concern under certain circumstances.

In applying the totality of the circumstances approach, the court concluded that “[g]iven the length of their employment and that all three resigned, the court finds that the defendants’ employment continued for a substantial period under Illinois law.” In addition, one of the three employees had been provided a grant of stock options, which had never vested, had not been paid out and had been forfeited upon termination. In looking at the totality of circumstances, the court found that in addition to continued employment, the grant of stock options served as adequate consideration as well.

While the Illinois Supreme Court has yet to rule on the issue of how much employment constitutes adequate consideration to support a restrictive covenant, the majority of Illinois appellate courts and Illinois federal courts have adopted the totality of circumstances approach. Regardless, employers should consider what consideration they can give to their employees, beyond employment or continued employment, to ensure that their restrictive covenants are enforced.