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Update: Georgia's New Non-Competition Statute*Lawmakers scramble over legislative mistake involving non-compete law*

A legislative snafu could delay the effective date of the new amendment to the Georgia constitution regarding restrictive covenants. The constitutional amendment was needed to support a new, employer-friendly statute that would have permitted much more restrictive non-competition and non-solicitation agreements with employees and others. The mistake might even invalidate the new non-competition statute and require its reenactment.

A drafting error in legislation leading up to the constitutional amendment leaves the new statute vulnerable to legal challenges and has supporters planning a fix when lawmakers return to session on January 10, 2011. Thus, employers should not rely on the new law until the situation is resolved.

The issue stems from a lack of consistency between the new statute and the constitutional amendment. The statute was passed in 2009 and states unambiguously that it shall take effect on the passage of the constitutional amendment. The statute may have been unconstitutional under the existing Georgia constitution, so companion legislation proposed a constitutional amendment to permit the statute. Unfortunately, the companion legislation that proposed the required constitutional amendment failed to include the amendment's effective date. As a result, another provision in the Georgia constitution provides that the constitutional amendment will be effective at the beginning of the following calendar year after passage of the constitutional amendment.

Georgia case law indicates that constitutional amendments are generally prospective-only. Thus, the constitutionality of legislation is generally determined by reference to the version of the constitution in effect when the statute was enacted. This is true even if the statute's effective date is delayed until after the constitutional amendment is passed or effective. Although a constitutional amendment can provide that it applies to previously enacted legislation, that was not done here.

Accordingly, employers should be wary about relying on the new statute until such time as the situation is clarified with re-adoption of the entire

non-competition statute, not just a "quick fix" for the effective date.

"It's just unfortunate that we didn't have some better insight about that language," House Judiciary Committee Chairman Wendell Willard, R-Sandy Springs, said. He added that he's confident that remedial legislation will be passed quickly once lawmakers return to Atlanta on January 10, 2011. Willard said legislation will have to go through the committee process and be voted on by the full House and Senate and sent to incoming-Gov. Nathan Deal for approval. Under normal circumstances that process can take months. When expedited, it can be done in days.

Stay tuned.

About the Authors

Jennifer A. Kenedy (Co-Chair of the firm's Board of Directors and Managing Partner of the Chicago Office) and **P. Russell Perdew** (Partner) work in Locke Lord's Business Litigation Practice Group. As national non-compete counsel for a large financial services company, Jennifer and Rusty enforce its employment agreements and protect its trade secrets from theft by departing high level employees by seeking injunctive relief in state and federal courts and before arbitration panels around the country.

Thomas D. Sherman is a partner at Locke Lord. He has more than 39 years of hands-on, results-oriented accomplishments in a wide variety of legal matters including mergers, acquisitions and joint ventures; SEC practice and compliance (Sarbanes-Oxley Act); commercial and employment law; equity and debt, public and private financings; general corporate law; litigation, including litigation management; and senior executive matters, including employment contracts, non-competition restrictions and severance agreements.