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New Georgia Non-Compete Law is a Peach for Employers

On November 2, 2010, Georgia voters passed an amendment to the Georgia Constitution that substantially changed state law governing non-competition, customer non-solicitation and non-disclosure agreements. See House Bill 173, codified at O.C.G.A. § 13-8-51 et seq. It is important to note, however, that the new statute applies only to employment agreements signed on or after November 3, 2010. The statute also applies to restrictive covenants contained in agreements between distributors and manufacturers, lessors and lessees, partnerships and partners, franchisors and franchisees, sellers and purchasers of a business or commercial enterprise, and two or more employers. For new employment agreements, the new law will be a game-changer for employers drafting and seeking to enforce restrictive covenants.

Georgia courts have long been hostile to restrictive covenants in employment agreements. While such agreements were not explicitly prohibited by any statute, onerous restrictions set forth in decades of case law led to the invalidation of seemingly reasonable restrictive covenants, making Georgia one of the most difficult states in which to enforce such agreements. For example, Georgia courts refused to enforce restrictive covenants in employment contracts that lacked strict limitations as to duration, territory and scope. See, e.g., *AGA, LLC v. Rubin*, 533 S.E.2d 804, 805-6 (Ga. 2000) (refusing to enforce a covenant that specified that a doctor could not work at any hospital at which he worked at during his tenure with his former employer because it did not define an explicit geographic area). Nationwide non-compete agreements were seemingly never upheld, even when their provisions were otherwise reasonable. See, e.g., *American Software Inc. v. Moore*, 448 S.E.2d 206, 209 (Ga. 1994). Georgia law also prohibited courts in most employment agreement cases (but not sale of business cases) from “blue-penciling”—the process of modifying overbroad restrictive covenants to make them enforceable. See, e.g., *Hamrick v. Kelley*, 392 S.E.2d 518, 519 (Ga. 1990). As a result, if a Georgia court determined that any provision of any restrictive covenant in an employment agreement was overbroad, and it often did, it would invalidate the entire covenant, not just the offending provision. See *Pregler v. C&Z, Inc.*, 575 S.E.2d 915, 917 (Ga. App. 2003).

The new law makes it much easier to draft and enforce restrictive covenants. The most significant changes in Georgia law are:

“No express reference to geographic area or to the types of products or services considered to be competitive shall be required in

order for the restraint to be enforceable.” O.C.G.A. §13-8-53(b);

A “good faith estimate of the activities, products, and services, or geographic areas, that may be applicable at the time of termination” is acceptable. O.C.G.A. §13-8-53(c)(1); see also O.C.G.A. §13-8-53(c)(2) (the geographic scope of a restrictive covenant need not be determined at the time of signing, and can be determined by the employee’s territory at the time of termination);

Restrictive covenants of two years or less are presumed reasonable. O.C.G.A. §13-8-57;

Restrictive covenants may be used to protect “legitimate business interests” including without limitation, “trade secrets,” “valuable confidential information,” “substantial relationships with specific ...customers,” and “customer ... good will.” O.C.G.A. §13-8-51(9); and

Georgia courts may now blue pencil an otherwise overbroad restrictive covenant by either removing unenforceable provisions, or by rewriting them so that they are enforceable. O.C.G.A. §§13-8-51(11)-(12); 12-8-53(d), 13-8-54(b). The only limitations on the power to “blue pencil” are that a court should try to “achieve the original intent of the contracting parties” and may not make any “covenant more restrictive with regard to the employee than as originally drafted by the parties.” O.C.G.A. §§12-8-53(d), 13-8-54(b).

The statute also relaxes requirements as to nondisclosure agreements in employment agreements and the other agreements to which the new statute applies. Georgia common law previously required a specific time limit on nondisclosure covenants. See *Pregler*, 575 S.E.2d at 917 (“This nondisclosure clause has no time limitation. A nondisclosure clause with no time limit is unenforceable....”). But now, employers are expressly permitted to protect their confidential information for however long the information remains confidential. O.C.G.A. §13-8-53(e) (“Nothing in this article shall be construed to limit the period of time for which a party may agree to maintain information as confidential or as a trade secret, or to limit the geographic area within which such information must be kept confidential or as a trade secret, for so long as the information or material remains confidential or a trade secret, as applicable.”).

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New Georgia Non-Compete Law is a Peach for Employers (cont'd.)

But be aware, the statute's terms do not apply to every employment agreement. As to covenants not to compete, the statute's reach is limited to agreements with (1) sales employees, (2) managers, (3) "key employee[s]," and (4) "professional[s]." See O.C.G.A. §13-8-53(a); see also O.C.G.A. §13-8-51(8) (defining a "key employee" as an employee that has high level of notoriety as the employer's representative, that is intimately involved in the direction of the business of the employer, or that is "in possession of selective or specialized skills, learning, or abilities or customer contacts or customer information who has obtained such skills, learning, abilities, contacts, or information by reason of having worked for the employer"); O.C.G.A. §13-8-51(14) (defining a "professional" as an employee "who has as a primary duty the performance of work requiring knowledge of an advanced type in a field of science or learning"). The inclusion of "sales employees," however, should adequately cover industries in which the purpose of such agreements is to protect their existing customer base.

The statute's reach is broader as to nonsolicitation and non-disclosure agreements, but is still limited to employment agreements with (1) "executive employee[s]", such as officers or directors, (2) "research and development personnel," (3) "persons[s] ... in possession of selective or specialized skills, learning, or abilities," and (4) "person[s] ... in possession of ... customer contacts, customer information, or confidential information." O.C.G.A. §§13-8-51(5), 13-8-52(a)(1).

Finally, as noted above, the statute only applies to agreements entered into on or after November 3, 2010. Consequently, employers who wish to take advantage of the statute's provisions will need to have incumbent employees sign new agreements that conform to the statute's requirements.

Georgia courts have generally considered continued employment to be sufficient consideration for a noncompetition agreement executed after the inception of employment. *Breed v. Nat. Credit Assn.*, 88 S.E.2d 15, 17-18 (Ga. 1955) (promise of continued employment sufficient consideration for noncompetition agreement where employee terminable at will upon one week's notice).

But be careful here. There is recent authority holding that an existing, written employment contract may not be supplemented by a new, separate non-competition/nonsolicitation agreement without some additional consideration. See *Glisson v. Global Sec. Services, LLC*, 653 S.E.2d 85, 87 (Ga. App. 2007) (continued employment was not sufficient consideration to support enforceability of noncompetition agreement where employee had an unexpired two-year employment contract that did not permit termination for refusal to sign a new noncompetition agreement).

Thus, employers who wish to have current employees that have written employment agreements sign a new agreement should provide some consideration in addition to continued employment. In those situations, unless there is a new agreement supported by consideration or an amendment to the former agreement, the pre-November 2, 2010, agreement will be judged by prior law. If, under prior law, the employment agreement restrictive covenants are well drafted and would likely withstand attack, there may no reason to adjust it. If an employer prefers to introduce the new statutory provisions (*i.e.*, geographic scope may be determined by an employer's activities at the time of termination, rather than, under prior law, at the time the noncompetition agreement was signed), then a new agreement supported by consideration would be in order, or perhaps an amendment to the prior agreement would suffice without any new consideration.

In any case, employers should review all existing employment agreements and confidentiality agreements in place, as well as current forms signed by new employees.

Our corporate attorneys in Atlanta routinely provide these services to our nationwide clients with Georgia employees and would be happy to assist you. Contact Brian Casey (404-870-4638), Neil Dickson (404-870-4617), Phil Cooper (404-870-4615) or Tom Sherman (404-870-4672) for any assistance you may need.

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 Perdue** (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.

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