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A NEW ERA FOR GEORGIA NON-COMPETE AGREEMENTS

Jun 06, 2011

On May 11, 2011, Georgia Governor Nathan Deal signed House Bill 30 into law, ushering in a new era for non-competition agreements (non-competes), non-disclosure agreements (NDAs), and non-solicitation covenants under Georgia law. Historically, Georgia courts have not been friendly to such agreements and have made enforceability unclear. The new statute clarifies and strengthens the ability of parties to restrict conduct during and after employment or a deal. Perhaps most importantly, the law expressly authorizes courts to cure or "blue pencil" such agreements signed on or after May 11, 2011. Under the previous regime, one faulty provision generally invalidated an entire restrictive covenant in Georgia. In addition, the new law makes clear that NDAs need not specify a time limit on a requirement to maintain information as confidential so long as the information otherwise remains confidential.

In Georgia, new consideration is not required to execute new non-competes, so employers are in a good position to strengthen their competitive protections under the revised statute, but action is required as only new agreements will enjoy the benefits of the new law. The new law also governs restrictive covenants between distributors and manufacturers, lessors and lessees, partnerships and partners, franchisors and franchisees, sellers and purchasers of a business or a commercial enterprise, and two or more employers.

In-Term Covenants Generally

The bill codifies many aspects of the law in this area that had developed in the Georgia courts. This includes the presumption that any restriction within an agreement that operates ***during the term*** of the underlying employment or business relationship is not unreasonable because it lacks any specific limitation on the scope of activity, duration, or geographic area as long as it promotes or protects the purpose of the agreement or deters any potential conflict of interest.

In addition, the following presumptions also apply to in-term covenants:

- **Duration** - A restricted time period equal to or measured by the duration of the parties' business relationship is presumed reasonable.

- **Geographic scope** - A restriction which covers the areas in which the employer does business at any time during parties' commercial relationship, even if not known at the time of entry into the restrictive covenant, is reasonable as long as the total restricted distance is also reasonable and/or the covenant contains a list of particular competitors that the restricted party may not contact for a limited period of time.
- **Scope of competition** - The scope of competition restricted is presumptively measured by the business of the employer or other person or entity in whose favor the restrictive covenant is given.

Post-Termination Covenants

Enforcement of contracts that restrict competition ***after the term*** of employment shall not be permitted against any employee who does not, in the course of his or her employment:

- regularly solicit for the employer customers or prospective customers;
- regularly engage in making sales or obtaining orders or contracts for products or services to be performed by others;
- perform the duties of a "key employee" or of a professional; or
- perform the duties of supervision and hiring/firing as a manager

This prohibition is not a major limitation on post-employment non-competes as most employees for which an employer desires to avoid competing with engage in one or more of these activity categories. In the case of a post-employment covenant entered into prior to termination, any "good faith estimate" of the activities, products, and services or geographic areas that may be applicable at the time of termination will satisfy any provision of the new statute requiring a description of such activities, products, and services or geographic areas, as will any description that provides "fair notice of the maximum reasonable scope of the restraint . . . even if the description is generalized or could possibly be stated more narrowly to exclude extraneous matters."

Through provisions that codify other aspects of Georgia case law, the following types of restrictive covenants are presumed reasonable in time under the new statute:

- Post-employment covenants - 2 years (measured from the date of termination of business relationship)
- Distributor, dealer, franchisee, lessee of real or personal property, or licensee of a trademark, trade dress, or service mark covenants - 3 years (measured from the date of the termination of the business relationship)

- Sale of business covenants - 5 years or the period of time during which payments are being made to the seller (measured from the date of termination or disposition of interest)

Non-Solicitation Agreements and NDAs

In **non-solicitation covenants**, express reference to geographic area or types of products or services considered to be competitive will *not* be required. Courts will instead look to whether the employee had "material contact" with the prospective customers during his or her employment for the purpose of providing products or services that are competitive to the employer's business. This is a very broad term under the new statute.

As noted above, under the new law, **NDAs** need not contain any limit on the period of time for which a party may agree to maintain information as confidential or as a trade secret, or any limit on 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 so. The law permits restrictive covenants as to information that constitutes a trade secret as well as other information about the business of an employer disclosed to or of which the employee became aware as a result of his or her employment, has value to the employer, and is not generally known to the employer's competitors.

Burden of Proof and Applicable Law In Light of the New Statute

Finally, under the revised Georgia statute, the person or entity seeking to enforce a restrictive covenant must plead and prove the existence of a "legitimate business interest" justifying the covenant. This is also a very broad term and includes, among other things, trade secrets and other valuable confidential information, substantial relationships with customers or vendors, customer goodwill, and extraordinary or specialized training. If the party seeking enforcement establishes prima facie evidence that the restraint is in compliance with the provisions of the statute authorizing it, then any person opposing enforcement has the burden of establishing that the specified restraint does not comply with such requirements or that such covenant is unreasonable.

As noted, the new law applies to restrictive covenants entered into on or after May 11, 2011. Because of a prior constitutional challenge to the statute, agreements executed prior to November 3, 2010, are subject to the old law, as in all likelihood are covenants dated between November 3, 2010, and May 10, 2011, inclusive.

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