Labor and Employment ADVISORY

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Dramatic, Employer-Friendly Changes to Georgia's Restrictive Covenant Law in the Hands of Georgia Voters

On November 2, 2010, Georgia voters may make it easier for employers to enforce restrictive covenants. House Bill 173 ("H.B. 173"), passed by the Georgia Legislature on April 1, 2009, and signed by Governor Perdue on April 29, 2009, proposes broad changes to restrictive covenants in the employment context. The proposed changes will take effect only if a majority of voters approve an amendment to the Georgia Constitution on November 2, 2010.

Current Restrictive Covenant Law

Restrictive covenants, which include non-solicitation, non-competition, non-disclosure, non-recruitment, confidentiality and trade secret provisions, have been notoriously difficult to draft and enforce in Georgia. Nearly every state subjects such covenants to a "reasonableness" requirement; however, under Georgia law, covenants are subjected to a significantly more rigorous review than in most states. One reason for such treatment is that the Georgia Constitution specifies that contracts that restrain trade are illegal and void. Based on this provision, courts interpreting restrictive covenants under Georgia law require the provisions of the covenant to be reasonable in the time, area and scope of activities prohibited. Without any specific definitions or provisions, reasonableness is determined by the courts and is subject to modification by subsequent case law.

Additionally, courts are not permitted to modify or "blue pencil" the conditions of a restrictive covenant to make them reasonable. Because any problem with the terms of the covenant could render the contract unenforceable, Georgia employers often draft restrictive covenants as narrowly as possible to ensure enforcement. This narrow drafting, however, often results in little protection for employers.

Georgia legislators previously recognized that Georgia restrictive covenant law was too harsh on employers and passed a law attempting to rework the courts' interpretation of restrictive covenants. The Georgia Supreme Court, however, found the legislation unconstitutional in *Jackson & Coker, Inc. v. Hart*, 405 S.E.2d 253 (Ga. 1991).

H.B. 173 and H.R. 178

In response to lobbying efforts by employers, the Georgia legislature drafted House Bill 173 for the purpose of "protecting legitimate business interests and creating an environment that is favorable to attracting commercial enterprises to Georgia and keeping existing businesses within the state."

The bill provides more guidelines for determining the reasonableness of a restrictive covenant and establishes more lenient interpretation of restrictive covenants by courts. Below are some of the more significant changes the bill would make to how courts review restrictive covenants:

- Courts are permitted to enforce portions of a restrictive covenant that are reasonable, even if other portions are unenforceable. The bill essentially reverses the current ban on "blue penciling."
- The bill defines key terms applicable to the interpretation of restrictive covenants, including confidential information, employee, legitimate business interest and material contact.
- For non-competition covenants, time restrictions of two years or less following the termination of employment are presumed reasonable.
- A non-solicitation covenant is assumed to apply to all customers with whom the employee had "material contact." The definition of "material contact" in the bill is expanded beyond the current common law definition.
- An expressed reference to a geographic area is not required to make a non-solicitation covenant enforceable.
- The provisions of the bill specifically exclude employees who lack "selective or specialized skills, learning, or abilities or customer contacts, customer information, or confidential information."
- Confidentiality and trade secret covenants do not require time restraints.

In order to ensure that this bill would pass a constitutional challenge, H.B. 173 operates in conjunction with H.R. 178. H.R. 178 provides for a ballot referendum to amend the Georgia Constitution. The provisions of H.B. 173 will not take effect unless voters ratify the amendment. The wording of the referendum states:

> Shall the Constitution of Georgia be amended so as to make Georgia more economically competitive by authorizing legislation to uphold reasonable competitive agreements?

What Does This Mean for Employers?

H.B. 173 and H.R. 178 enjoyed wide, bipartisan support in the legislature, and the ballot referendum is not expected to be strongly opposed. If Georgia voters approve the referendum, the changes to the restrictive covenant law set forth in H.B. 173 will become effective on November 3, 2010. The changed law, however, will only be applied to contracts entered into on or after November 3. Contracts entered into November 2, 2010, or before will continue to be governed by the current law. If voters ratify the constitutional amendment on November 2, employers should consult with their attorneys to revise contracts for incoming and current employees to take advantage of the more employer-friendly law.

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