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Georgia's new non-compete and non-solicitation laws

A quick overview of Georgia's new restrictive covenants laws and some tips to help you protect your interests.

Georgia has passed a new law that should make it easier for employers to write non-competition, non-solicitation and related provisions. The new law gives courts new flexibility in enforcing agreements during litigation. We interviewed several of Georgia's top employment attorneys to help clarify these laws and provide some insight.

NON-COMPETE AND NON-SOLICITATION

There are four provisions that fall within a category of employment agreements that are known as Restrictive Covenants. These covenants include non-recruitment and confidentiality agreements. Because they have historically been the most difficult provisions to draft and to enforce this brief will focus on non-compete and non-solicitation provisions.

- Non-compete provisions prohibit employees from engaging in businesses that are in direct competition with a former employer. The definition of the term "competing business" is essential in these provisions.
- Non-solicitation typically prohibits contact with and solicitation of customers with whom the employee has dealt within a defined period of time from before and after the employee's employment.

In order to be enforceable both non-competes and non-solicitation provisions have to include limitations on:

1. The time period to which they will apply (most typically two years),
2. The scope of restricted activities (must be limited to a prohibition on engaging in activities similar to those engaged in on behalf of the employer within the same industry), and
3. Geographic territory (in which the employee cannot engage in the prohibited activity. In non-solicitation provisions a geographic scope can be substituted with a term that the limitation on solicitation will only apply to customers with whom the employee had direct contacts).

THE OLD VS. THE NEW LAWS

Prior to the new law, restrictive covenants including both a non-compete and a non-solicitation provision lived and died together as drafted. If a judge found that any one of the three requirements listed above in either of these provisions was overbroad or unenforceable he was required to void both provisions in their entirety. Because of this, and because non-competes have been harder to enforce than non-solicitation provisions, many attorneys advised clients to only use a non-solicitation provision if doing so would adequately protect their interests.

The new law gives judges the flexibility to enforce non-compete and non-solicitation provision independently. While the new law still requires that non-compete and non-solicitation provisions include limitations on time, scope of activity and territory (or customers to whom applicable), what is acceptable with regard to these requirements is now broader.

Most significantly, under the new law a court may "blue pencil" an overbroad provision. That is, the new law allows judges to revise the covenant to make it more reasonable.

HIRING & PROTECTING YOUR INTERESTS

Another issue that is very important is the protection of trade secrets and proprietary information. When hiring there is always the risk that the prospect's (or new hire's) previous employer will say that its former employee has taken and/or is using trade secrets. This area poses the greatest risk to hiring employers because trade secret litigation pits company against company and Georgia's Trade Secret Act includes provisions to recoup both attorney fees and punitive damages. The majority of conflicts will arise over the protection of confidential proprietary information. Unlike trade secrets, confidential information is not protected by law unless there is a confidentiality agreement in place.

The control of electronic information should be of major concern to the hiring employer, according to Randy Grayson, of Grayson Law Group, . "Policies and procedures should be put in place that clearly define the types of electronic information incoming employees can place on the network." Incoming employees often consider the electronic work product created at their past jobs as mere personal productivity tools. Project templates, spreadsheets, reference documents and contact lists should be considered the property of the past employer and should be prohibited to avoid risk.

A hiring employer should require all serious job candidates to provide full disclosure of all signed agreements and all agreements should be reviewed by legal counsel for potential risks.

In competitive industries it will be next to impossible to avoid restrictive covenants. But employers needn't let these agreements inhibit hiring as long as they are taking the appropriate precautions to protect their interests.

When employees with restrictive covenants go to work for competitors, the former employer will frequently sue the hiring company and the former employee, seeking an injunction prohibiting the new employee from working for the new employer and seeking damages. Damages are sought from the new employer under the theory of tortious interference with contractual or business relationships. This is only possible if a new employer knows there is a restrictive covenant in place. Therefore, a hiring employer should require all serious job candidates to provide full disclosure of all signed restrictive covenant agreements and all agreements should be reviewed by legal counsel for potential risks. New hires should then be required to sign an agreement prior to their start date, stating they have disclosed all agreements that may restrict their ability to work for the hiring employer in

the particular position being offered. These agreements will make it very difficult for the former employer to prove any claim against the new employer.

HERE COMES THE JUDGE

It may take several years to see the full impact of this law, since it only applies to agreements entered into after its effective date. And there is some question as to whether this was November 3, 2010 or the day the Governor signed additional enacting legislation, May 11, 2011.

Historically Georgia law has favored employees and been tough on companies in restrictive covenants litigation. Many attorneys believe that when agreements subject to the new law begin to come before the courts, judges may continue to follow many of the same standards applicable prior to the change in the law. Perhaps either out of force of habit or because certain standards have been enforced so long that judges may believe they represent what is fair.

Courts could do this in one of several ways, for example by refusing to enforce covenants that are not relatively consistent with the old standards, on grounds such as that the employer overreached so much that they should not get any protection. More likely courts may simply blue pencil agreements in a way that is consistent with the old standards.

IN CONCLUSION

This is a good time to review your existing policies and agreements to make sure they are inline with the new laws. Rhonda Klein, employment attorney with Wimberly, Lawson, Steckel, Schneider, & Stine, P.C., believes, "It's still a good idea to draft your agreements as conservatively as you can, casting an eye to how judges have ruled in the past. If you don't need a non-compete and if a non-solicitation agreement will cover you sufficiently then only execute a non-solicitation agreement."

On the strategic level, hiring employers should focus more on acquiring the skills and experience needed to move their organizations forward and less on hiring as a means of damaging the competition or gaining strategic insight.

As always, the smart companies will forge ahead, cover their bases, weigh the risk and manage their exposure.

OFF THE RECORD

Perkins soon discovered that his new hires had non-competes with their previous employers.