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BRIEFING ON INFORMATION TECHNOLOGY LAW

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NONCOMPETE COVENANTS IN EMPLOYMENT AGREEMENTS

Part One of a Three Part Series

I. Introduction: What Are Restrictive Covenants and Why Are They Useful?

In the absence of a contract providing otherwise, an employee is free to leave an employer at any time and set up a competing business next door, or across the street. To prevent this from happening, employers may - within very narrow parameters - require their employees to sign agreements preventing them from either joining or forming a competing business in the same geographic area, or joining or forming a competing business while taking with them valued customers and employees. Such agreements are known as “restrictive covenants”. In addition to needing the protection of restrictive covenants, many employers are now faced with the prospect of hiring employees who may be subject to restrictive covenants imposed by a former employer.

Although the Georgia courts generally disfavor restrictive covenants, they can be enforced if narrowly drawn.

This article will address Covenants Not to Compete² in general; for specific situations, it is advisable to consult counsel.

II. General Information About All Restrictive Covenants In Employment Agreements And Similar Contracts.

The typical employment agreement will contain more than one restrictive covenant. The standard restrictive covenants are: Covenants Not to Compete, Covenants Not to Solicit Customers, and Covenants Not to Solicit Employees. This article will only address Covenants

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²This article addresses only those Covenants Not to Compete found in employment agreements and similar contracts. The analysis employed herein may also apply to independent contractor agreements, franchise agreements and, in some respects, partnership agreements. Agreements ancillary to the sale of a business are subject to different analysis which is beyond the scope of this article.

Not to Compete.³

A prospective employee may not have much choice in whether to sign an employment agreement containing one or more restrictive covenants, as hiring or (if the employee has already been hired) continued employment is legally sufficient compensation for signing an employment agreement containing a restrictive covenant. Nevertheless, just as employers may wish to retain counsel to increase the likelihood that any employment agreement signed by their employees will be enforceable if tested by a court, candidates with bargaining power may also wish to retain counsel to advise them prior to their signing the employment agreement.

Because restrictive covenants are deemed to be in restraint of trade, Georgia's courts do not favor enforcement of restrictive covenants and will strictly construe them, always applying Georgia law when doing so. Consistent with this public policy, a restrictive covenant will not be rewritten ("blue pencilled") by a Georgia court to make the covenant enforceable if the covenant is overly broad as written. This means that when a restrictive covenant is drafted for an employer, it must be written as narrowly as possible while still providing the necessary level of protection.

In addition, the restrictive covenant must be very specific as to the nature of the restriction so that a court will not decide that it is vague and, therefore, unenforceable. When drafting a restrictive covenant, counsel will likely need to gather detailed information regarding the nature of the business to be protected and the specific duties of the employee(s) who will be asked to sign the employment agreement, to make sure that these goals of narrowness and specificity will be met in the final product.

Some issues have arisen concerning when a restrictive covenant will survive termination of an employment agreement. Restrictive covenants can be drafted to avoid the typical outcome of contract disputes, in which a party cannot enforce a contract which that party has breached. It is settled law in Georgia that restrictive covenants containing language providing for their survival upon breach of the employment agreement by the employer *may be enforced against the employee even where the employer has breached the employment agreement (e.g., by failing to pay the employee)*.

III. The Basics of Covenants Not To Compete.

A. Purpose

Generally, Covenants Not to Compete, also called "Noncompetes", are used by an employer to prevent a valuable employee from competing with the employer after termination of employment in the same type of business and the same geographic territory in which the employee worked for that employer.

B. Criteria for Enforceability

³Part 2 of this series will address Covenants Not to Solicit Customers and Covenants Not to Solicit Employees. Part 3 will address Trade Secret protections and Nondisclosure Clauses in employment agreements.

Noncompetes must be reasonable as to duration, territory, and scope. Georgia courts look upon Noncompetes with disfavor; therefore, if the Noncompete is overly broad, vague or otherwise unreasonable, the court will simply refuse to enforce the Noncompete on the ground that it has the effect of preventing the employee from earning a living, rather than simply protecting the employer's interests. Georgia courts are not authorized to rewrite or "blue pencil" an unreasonable or vague Noncompete so as to render it enforceable.

Although some clear parameters exist as to what is considered reasonable, many Noncompetes fall within gray areas in which their enforceability will depend on the employer's and employee's specific circumstances. For this reason, it is important that the attorney drafting the Noncompete have as much information as possible concerning both the employer's business and the employee's specific responsibilities. It is also important to review and possibly rewrite employment agreements as the employer's business changes, or the employee's responsibilities change, to make sure that the Noncompete addresses the employer's current needs. In addition, Georgia law is constantly changing as the appellate courts refine the standard for what is a reasonable Noncompete. Therefore, clients are advised to periodically review employment agreements with counsel to be certain that the Noncompetes continue to be enforceable under the current state of the law.

1. Duration

Typically, a Noncompete of a duration less than one year will be enforceable. A Noncompete lasting longer than three years likely will not be enforceable. But whether a Noncompete of a duration longer than one year and shorter than three years will be enforceable will depend on a variety of circumstances. Generally, given Georgia courts' reluctance to enforce Noncompetes, the Noncompete should have a duration only as long as necessary to protect the employer's interests. The scope and territory encompassed by the Noncompete will also have a bearing on the reasonableness of the duration, with a narrow scope and territory supporting a longer duration.

The employee's skill level or degree of relevant knowledge will also have a bearing on the reasonableness of the Noncompete's duration. Thus, a Noncompete which protects an employer who has invested many hours and thousands of dollars in training an employee will more likely be enforceable than a Noncompete which protects an employer who did not provide any training. Similarly, a Noncompete signed by an employee who has unique skills or contacts which will be difficult to replace will more likely be enforceable than a Noncompete signed by an employee with no special skills. For example, in a case decided recently by the Georgia Court of Appeals, a Noncompete which barred a carpet layer from competing with the employer within an eighty mile radius of the employer for two years was deemed overly broad in light of the minimal amount of training required for carpet laying.

In sum, when evaluating a Noncompete with a duration in the "gray areas", the court is likely to explore whether any special circumstances apply to the employee which warrant a Noncompete of a duration longer than one year. Indeed, in cases in which a three year duration is deemed necessary, it may be advisable to recite in the Noncompete the special circumstances, such as unique skills or specialized training, which warrant a Noncompete of this duration.

2. Geographic Territory

The territory encompassed by the Noncompete can be described in any number of ways so long as the territory is “knowable” *at the time the employment agreement is signed*. Thus, a Noncompete which describes the territory by zip code, county name(s), a specified radius of the employer’s offices or the like as of the time the contract is signed, will not be attackable for lack of certainty.

In contrast, a Noncompete which describes the territory as the counties in which the employee works at the time of *termination* (as contrasted with the time of hiring), a certain radius of the employer’s offices at the time of *termination*, or some other territory which can be changed unilaterally by the employer, will be unenforceable because the employee cannot be certain *at the time he signs the agreement* of the restricted territory.

The territory must be appropriately narrow and reasonably related to the employer’s business needs. Factored into this must be the employee’s position. The ultimate question will be whether a reasonable basis exists for the specified territory. Thus, if the employee only works in one or two counties, a judge will be unlikely to enforce a territorial restriction which encompasses the entire state of Georgia, or even other counties in which the employee does not work. For this reason, an employer which has employees performing identical duties in different territories throughout the state must tailor individual employment agreements to accurately describe each employee’s territory in the employment agreement. If the employee actually works in the entire state and the specified territorial restriction encompasses the entire state, a court may enforce this restriction, but before doing so will likely require some evidence of a need for such a broad territorial restriction.

If the employee works in a broader territory than that specified in the Noncompete, the Noncompete will still be enforceable, but will only protect the employer in the specified territory. For this reason, an employer may wish to periodically review and rewrite as necessary its employment agreements to ensure that the specified territory (and job description) accurately reflect the employee’s responsibilities.

3. Scope

The scope of activity prohibited by the Noncompete must accurately reflect the employee’s duties. This prong of analysis of Noncompetes has been the source of most of the litigation in recent years, because case law requires that the description be both: (1) sufficiently clear to reasonably acquaint the employee with his obligations at the time he signs the employment agreement, and (2) reasonably related to the employee’s duties at the time of termination. It is, of course, difficult to meet this drafting standard when an employee’s duties change over time. The wise employer will periodically review with counsel - and rewrite as necessary - the job descriptions set forth in its employment agreements. The employer should also resist the impulse to use a generic job description for all employees, since such a description is likely to be either inaccurate as to some employees or so generic as to be unenforceably vague as to many employees.

The restricted scope can only be as broad as necessary to protect the employer from competing activities by the employee. Thus, a restriction which is tied not to the *employee's* actual duties but to the *employer's* line of business will be overly broad.

A Noncompete which bars the employee from engaging in activities different from his responsibilities for the employer also will be struck as overly broad. Similarly, a Noncompete which bars competition with the employer "in any capacity" will be struck as overly broad.

IV. Enforcement of Covenants Not to Compete

In the event that a Noncompete satisfies all three prongs described in Part III, the employer may seek to enforce it against both the employee and the employee's new employer. In particular, the employer may seek an injunction to prevent the employee from competing with the employer in violation of the Noncompete, and to prevent the new employer from putting the employee to work in a manner which violates the Noncompete. In addition, the employer may seek an award for damages arising from the violation of the Noncompete, with these damages assessable against the employee and, in some circumstances, the new employer.

Next Issue: Covenants Not To Solicit Customers and Employees

About the Firm

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