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Employment Agreements In Georgia: Avoiding Costly Mistakes

by Benjamin I. Fink

Restrictive covenants in employment agreements are an important tool in protecting the customers, clients, business and competitive information of your company from being taken by an employee who leaves your company. But such covenants in your out-of-state employment agreements may not be enforced in Georgia, even if they are enforceable in other states.

Georgia courts are among the strictest in the country when it comes to enforcement of restrictive covenants in employment agreements. If an out-of-state attorney or law firm drafted your company's employment agreements, there is a good chance the restrictive covenants in them are unenforceable in Georgia. A provision that the law of another state governs the employment agreement will not save a restrictive covenant that is unenforceable under Georgia law.

The enforceability of restrictive covenants in employment agreements is constitutional in nature. The Georgia constitution provides that all contracts that have the effect of or are intended to defeat or lessen competition or encourage a monopoly are illegal and void. Restrictive covenants in employment contracts are considered to be in partial restraint of trade and will only be enforced by the courts in Georgia if the restraints are not unreasonable, are given in return for something of value, are reasonably necessary to protect the interest of the employer, and do not unduly prejudice the public interest.

The three types of restrictive covenants most often used are:

- A non-competition covenant generally prohibits an employee from engaging in any competition with the employer after termination of employment.
- A non-solicitation provision restricts an employee from soliciting business from certain of the employer's customers or prospective customers after termination of employment.
- A non-recruitment covenant restricts an employee from recruiting employees of the employer to a competing business after termination.

Georgia courts typically use a three-part test to determine the reasonableness of covenants in employment agreements. The covenants must be reasonably limited in terms of the time in which they bind the employee, the scope of conduct prohibited, and the geographical territory in which they bind the employee. Overly broad and prohibitive covenants are vulnerable to attack in Georgia, more so than any other state. Employers who try to restrict former employees without good cause will be disappointed and may risk the loss of business and competitive advantage when their covenants are struck down by the courts.

Covenants must be concise, precise, and carefully tailored to the interests of the employer. Each prong of the test merits further explanation.

- **Duration of the Restraint.** In Georgia, no time restriction is unreasonable, *per se.* Although one- and two-year durations are typical, a five-year limitation has been upheld. In order to be reasonable, limitations in time should bear some relation to the amount of time needed by the employer to re-establish and solidify its relationships with its customers, clients and employees.
- **Scope of Conduct Restricted.** The covenants must explain precisely the nature of the business in which the employee is prohibited from engaging, and must relate to that which the employee did for the employer during his employment.
- **Geographic Limitations.** A territorial limitation is ordinarily a necessary element of a covenant against competition. A geographic restriction must specify with particularity the geographic area in which the employee is restricted from competing. There is a vital difference between the territory in which the employer does business and the territory in which the employee does business. A non-compete covenant can only apply in the geographic areas in which the employee worked for or represented the employer.

Georgia courts have consistently struck down non-compete covenants that apply wherever the employer was doing business. Territorial restrictions that encompass the entire U.S. or the world are

also consistently struck down as overly broad and unenforceable.

Until 1992, all restrictive covenants were required to contain a geographical restriction. However, in a watershed decision, *W.R. Grace & Co. v. Mouyal*, the Supreme Court of Georgia upheld a non-solicitation covenant without a geographic limitation because it only related to customers with whom the former employee had contact while employed by the employer. This represented a significant change in Georgia law concerning restrictive covenants. In rendering this opinion, the Supreme Court recognized that the reality of the modern business world is that today's employees' territories have no geographic boundaries. Employees service customers throughout the country and the world, and demanding a geographic restriction would severely limit an employer's ability to protect its interests. Therefore, a non-solicitation clause in an employment contract that prohibits the solicitation of the employer's clients or prospective clients who the employee actually contacted for a business purpose while serving the employer will be enforced, notwithstanding the absence of an explicit geographical limitation.

Unless absolutely necessary, it is advisable in Georgia to avoid the inclusion of a non-competition covenant. Instead, the use of a non-solicitation provision and confidentiality covenant is advisable to accomplish your goals.

■ **Severability.** Different from many other states, Georgia courts will not blue-pencil an overly broad covenant ancillary to an employment agreement, even if the agreement explicitly provides that it can be modified by the courts if it is found to be too broad. In other words, if any portion of a covenant is unenforceable (if any one of the three prongs is unreasonable), the entire covenant is unenforceable. With the addition of a severability clause to the agreement, different covenants within the same agreement may be severable and enforceable on their own.

■ **Passive Solicitation.** Absent a non-competition covenant, the employer cannot prohibit a former employee from merely accepting business from the employer's customers without any solicitation or inducement by the former employee.

■ **Tolling Provisions.** A provision suspending the running of the time period of the covenant during litigation is enforceable. Suspending of the period of limitation while the former employee is in violation of the covenant is invalid in that it potentially extends the duration of the covenant without limit.

■ **Consideration.** The prospect for employment or continued employment is an adequate basis for obtaining restrictive covenants from employees in Georgia.

■ **The Choice-of-Law Trap.** Most important for employment agreements prepared by out-of-state counsel for local offices or subsidiaries, the law of the state chosen by the parties to govern the contract will not be applied by Georgia courts where application of the chosen law is contrary to the policy of, or will be prejudicial to the interests of, the state of Georgia. Therefore, given Georgia's public policy of not restricting trade, the chosen law of another state in an employment agreement will likely not be applied by a Georgia court to uphold the restrictive covenants if they violate Georgia law.

■ **Severance Agreements.** Restrictive covenants contained in severance agreements or other agreements ending the employment relationship are generally subject to the same strict scrutiny applied to those within employment contracts.

■ **Post-Termination Compensation.** Even if the restrictive covenants in an employment agreement are unenforceable, an employer's contractual obligation to pay the employee post-termination compensation remains where the agreement contains a severability clause and there is consideration other than the covenants for the compensation.

Conclusion

While this article provides a very general outline of the Georgia law that applies to restrictive covenants in employment agreements, there is much more which must be taken into consideration in drafting and enforcing such agreements. Local companies should be sure that the attorney who drafts their agreements, and the one they choose to enforce them, is well-versed in the nuances of Georgia law in this area and remains current as the law is constantly changing.

For those who rely on out-of-state counsel to prepare their agreements, Georgia counsel should be consulted to ensure that the strict scrutiny the Georgia courts apply to such agreements does not cause them to be unenforceable. Using a form prepared by out-of-state counsel which is used throughout the country is almost a guarantee that the agreements will not be enforceable in Georgia. ■

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