RESTRICTIVE COVENANTS LEGISLATION TO GO INTO EFFECT UPON PASSAGE OF CONSTITUTIONAL AMENDMENT IN 2010 GENERAL ELECTION

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As many employers know, Georgia is one of the more difficult states in which to enforce restrictive covenants in employment agreements. Georgia courts have historically been extremely hostile to restrictive covenants in the employment context. However, legislation recently passed by the Georgia legislature and signed by Governor Perdue may significantly change Georgia law on restrictive covenants. If the legislation goes into effect, Georgia will become considerably more pro-employer with respect to this issue.

House Bill 173 was overwhelmingly passed by the Georgia House of Representatives and Senate during the 2009 legislative session, and the bill was signed by the Governor on April 29, 2009. Nevertheless, the law has not yet gone into effect. Before the law becomes effective, an amendment to the Georgia Constitution must be approved in a statewide referendum in the 2010 general election. The reason for this is that Georgia's hostility to restrictive covenants is rooted in its Constitution. Article 3, section 6, paragraph 5 of the Constitution of Georgia states the "General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition, or encouraging a monopoly, which are hereby declared to be unlawful and void." Accordingly, House Bill 173 would likely be declared unconstitutional, absent ratification of an amendment to this constitutional provision. Previous legislation attempting to reform Georgia's law on restrictive covenants was struck down on this basis.

If the law does goes into effect, Georgia law on restrictive covenants will substantially change. One notable change is that Georgia courts will be permitted to modify unreasonable restraints.

Under current Georgia law, if a restriction in a covenant is formed by a court to be overbroad, the court cannot modify the covenant to make the restriction reasonable. Rather, the covenant is unenforceable in its entirety. For example, as the law exists now, if the geographic territory in which an employee is restricted from working includes areas where the employee did not work for or represent the employer, the covenant cannot be modified by a court to restrict the employee from working in only those areas in which the employer may reasonably restrict the employee from working. Instead, the entire covenant will be declared unenforceable. Furthermore, if one covenant against competition in an employment agreement is found to be overbroad and unenforceable, the other covenants against competition in the agreement are rendered unenforceable.

The new legislation changes these rules by permitting the court to modify overbroad restrictions based on its determination of what is reasonable. This new rule will provide significant relief to many employers who currently can be left with no protection if any portion of a restrictive covenant in their employee's agreement is found to be overbroad.

While the law will not apply to contracts entered into before it becomes effective, employers should be aware that House Bill 173 may make it easier in the future for employers to protect their customer relationships, trade secrets and confidential information using restrictive

covenants in employment agreements. Of course, the new law will also make it more difficult for companies to hire employees from their competitors, so it will only benefit those employers who do not wish to do so. If the law does go into effect after the 2010 general election, employers are strongly advised to seek the assistance of counsel to understand the impact of the law and ensure that restrictive covenants in any new employment agreements, or in revisions of current employment agreements, comply with the new law. We will endeavor to inform you whether the referendum passes in that election.