

Confidentiality Agreement: General (Short Form, Mutual) (GA)

BENJAMIN I. FINK AND NEAL F. WEINRICH, BERMAN FINK VAN HORN P.C.,
WITH PRACTICAL LAW COMMERCIAL TRANSACTIONS

Search the [Resource ID numbers in blue](#) on Westlaw for more.

A short-form mutual confidentiality agreement, governed by Georgia law, for general use in connection with commercial transactions. This Standard Document has integrated notes with important explanatory drafting and negotiating tips, and includes links to general and state-specific standard documents, standard clauses, and practice notes.

DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

Parties to a potential commercial transaction often use a confidentiality agreement (also known as a nondisclosure agreement or NDA) to:

- Preserve the confidentiality of the disclosing party's sensitive information.
- Restrict the recipient's use of the disclosing party's confidential information except for limited purposes that are expressly permitted under the agreement.
- Protect the confidential nature of the potential transaction and the discussions they are holding.

Sometimes, only one party is disclosing confidential information and a unilateral confidentiality agreement should be used. In other situations, both parties are disclosing and receiving confidential information. In these instances, the parties enter into a mutual confidentiality agreement that applies the same set of rights and obligations to each party based on its role as disclosing party or recipient.

Under some circumstances, both parties are disclosing confidential information but not on a fully mutual basis (for example, if one party is disclosing more sensitive information that requires different types of protection). In these situations, instead of entering into a mutual confidentiality agreement, the parties enter into a reciprocal confidentiality agreement, in which:

- The scope and nature of the confidential information disclosed by each party is separately defined.
- Each party's use and nondisclosure obligations may differ accordingly.

This Standard Document is a short-form mutual general confidentiality agreement for use in Georgia. It assumes that each party is disclosing and receiving confidential information under a mutual set of rights and obligations. This agreement can be used for many types of commercial relationships and transactions that support the use of a short-form mutual agreement.

For a sample of a more comprehensive mutual general confidentiality agreement, see Standard Document, Confidentiality Agreement: General (Mutual) ([1-501-7108](#)). For more information on confidentiality agreements and overall protection of confidential information, see Practice Note, Confidentiality and Nondisclosure Agreements (GA) ([W-008-9299](#)).

Because each of the rights and obligations in a mutual confidentiality agreement applies to both parties, this agreement is drafted to address the high-level concerns of both a disclosing party and a recipient, reflecting a balanced and relatively moderate approach under Georgia law. When drafting or reviewing this agreement, each party should:

- Determine whether it is more likely to be disclosing or receiving confidential information (and the nature of that information, including whether that information qualifies as a trade secret).
- If appropriate, revise the provisions of this agreement to better support its primary position.

For a sample short-form unilateral confidentiality agreement drafted with terms favorable to the disclosing party, see Standard Document, Confidentiality Agreement: General (Short Form, Unilateral, Pro-Discloser) ([5-535-7285](#)). For a sample short-form unilateral confidentiality agreement drafted with terms favorable to the recipient, see Standard Document, Confidentiality Agreement: General (Short Form, Unilateral, Pro-Recipient) ([3-532-3908](#)).

ASSUMPTIONS

This Standard Document assumes that:

- **The agreement is governed by Georgia law.** If the law of another state applies, these terms may have to be modified to comply with the laws of the applicable jurisdiction.
- **The parties to the agreement are US entities and the transaction takes place in the US.** If any party is organized or operates in, or if any part of the transaction takes place in a foreign jurisdiction, these terms may have to

be modified to comply with applicable laws in the relevant foreign jurisdiction. For examples of a confidentiality agreement that may be used when one or both of the parties are non-US entities or if the transaction takes place outside of the US, see Confidentiality Agreement (US-Style, Unilateral, Pro-Discloser): Cross-Border Commercial Transactions ([w-006-7778](#)) and Confidentiality Agreement (US-Style, Mutual): Cross-Border Commercial Transactions ([W-002-9375](#)).

- **This agreement is being used in a business-to-business transaction.** This Standard Document should not be used in a consumer contract, which may involve legal and regulatory requirements and practical considerations that are beyond the scope of this resource. This Standard Document also should not be used in the employment context, as that may involve other requirements and practical considerations that are beyond the scope of this resource.
- **This is a mutual agreement, which assumes that both parties are disclosing and receiving confidential information.** This agreement should not be used if only one party is disclosing confidential information (see Standard Documents, Confidentiality Agreement: General (Short Form, Unilateral, Pro-Recipient) ([3-532-3908](#)) and Confidentiality Agreement: General (Short Form, Unilateral, Pro-Discloser) ([5-535-7285](#))). In addition, this agreement must be revised if the parties are not sharing confidential information on a fully mutual basis and the parties are instead entering into a reciprocal confidentiality agreement that contains party-specific rights and obligations to reflect any differences in the scope and type of confidential information that each party expects to disclose (see Practice Note, Confidentiality and Nondisclosure Agreements (GA): Mutual Confidentiality Agreements ([W-008-9299](#))).
- **This agreement is being used for a single discrete project, with all confidential information disclosed shortly after the execution of the confidentiality agreement.** This agreement must be revised if:

- the parties desire to enter into a confidentiality agreement that covers multiple projects; or
- confidential information is being disclosed over an extended period of time.
- (See, for example, Section 7 and its related Drafting Note.)
- **The parties are not direct competitors.** If the parties to the confidentiality agreement are direct competitors (who are, for example, pursuing a potential joint venture arrangement), they may need to revise this agreement to:
 - confirm that the agreement does not restrict the parties' ongoing competitive activities;
 - protect independent development;
 - restrict the persons at each company that a party may contact to request, receive and discuss any confidential information;
 - restrict access to certain types of confidential information to each party's independent external advisors or to executives working at the corporate (non-operating) level; or
 - provide for non-solicitation of either party's customers, suppliers, or employees (noting that a mutual non-solicitation provision is more likely to be held anti-competitive and, therefore, unenforceable).
- For a sample non-solicitation provision, see Standard Clauses, Confidentiality Agreement: Non-Solicitation Clause (GA) ([W-008-9294](#)).
- **These terms are not industry-specific.** This Standard Document does not account for any industry-specific laws, rules, or regulations that may apply to certain transactions, products, or services.
- **This is a short-form agreement that does not include every provision that parties may include in a longer agreement.** For a sample of a more comprehensive mutual general confidentiality agreement, see Standard Document, Confidentiality Agreement: General (Mutual) ([1-501-7108](#)).

BRACKETED ITEMS

Bracketed items in ALL CAPS should be completed with the facts of the transaction. Bracketed items in sentence case are either optional provisions or include alternative language choices, to be selected, added, or deleted at the drafter's discretion.

Confidentiality Agreement

This Confidentiality Agreement (the "**Agreement**"), dated as of [DATE] ("**Effective Date**"), is between [PARTY A NAME], a [STATE OF ORGANIZATION] [ENTITY TYPE] located at [ADDRESS], and [PARTY B NAME], a [STATE OF ORGANIZATION] [ENTITY TYPE] located at [ADDRESS] (each, a "**party**" and, collectively, the "**parties**").

DRAFTING NOTE: PREAMBLE

The preamble should include the full name, business address, entity type, and applicable state of incorporation or organization of each party. Each party should include an accurate street address because, in this short-form agreement, notices must be sent to the counterparty's

address stated in the preamble (see Section 11). The parties should also ensure that the effective date is correctly identified because the term of the parties' rights and obligations is defined as a specified period of time following the effective date (see Section 7).

1. In connection with [DESCRIPTION OF PURPOSE] (the “**Purpose**”), either party (“**Disclosing Party**”) may disclose Confidential Information (as defined below) to the other party (“**Recipient**”). Recipient shall use the Confidential Information solely for the Purpose and, subject to Section 3, shall not disclose such Confidential Information other than to its [affiliates and its or their] employees, officers[, directors][, shareholders][, partners][, members][, managers][, agents] [, independent contractors][, service providers][, sublicensees][, subcontractors], attorneys, accountants, and financial advisors (collectively, “**Representatives**”) who: (a) need access to such Confidential Information for the Purpose; (b) are informed of its confidential nature; and (c) are bound by [written] confidentiality obligations no less protective of the Confidential Information than the terms contained herein. Recipient shall safeguard the Confidential Information from unauthorized use, access, or disclosure using the greater of a commercially reasonable degree of care or the degree of care with which it protects its own information. Recipient will be responsible for any breach of this Agreement caused by its Representatives. [Recipient agrees to notify Disclosing Party in writing [within [NUMBER] days] of any misuse or misappropriation of the Confidential Information of Disclosing Party that may come to Recipient’s attention.]

DRAFTING NOTE: DISCLOSURE AND USE OF CONFIDENTIAL INFORMATION

The recipient’s obligations regarding the use and protection of confidential information are central to any confidentiality agreement. Section 1 is a short-form provision that:

- Broadly prohibits disclosure of confidential information except to the recipient’s “Representatives” that satisfy certain conditions.
- Restricts use of the confidential information by the recipient and its representatives to the potential transaction. Many confidentiality agreements limit the disclosure or exchange of confidential information to a specified business purpose, such as “to evaluate a potential marketing arrangement between the parties.” A defined business purpose is especially useful as a basis for access and use restrictions in the agreement. For more information on restricting use of confidential information for a specific business purpose, see Practice Note, Confidentiality and Nondisclosure Agreements (GA): Business Purpose ([W-008-9299](#)).
- Requires the recipient to protect the confidential information from unauthorized disclosure using at least a commercially reasonable degree of care.
- Makes the recipient legally responsible for any breaches of the agreement by the recipient’s representatives.
- Optionally requires the recipient to notify the disclosing party in writing of any misuse

or misappropriation of the confidential information of the disclosing party that may come to the recipient’s attention. The disclosing party may require notice within a specified period of time. Where a specified time is not listed, the disclosing party may require “timely,” “prompt,” or “reasonable” notice of the disclosure. The recipient may resist the inclusion of this bracketed requirement as too one-sided.

Some provisions also:

- Contain more onerous conditions for permitting disclosure to the recipient’s representatives.
- Require the recipient, in addition to notifying the disclosing party of any unauthorized use or disclosure of confidential information (see optional bracketed language), to take specified actions to prohibit further unauthorized use or disclosure.

In addition to making the recipient liable for breaches caused by its representatives, the disclosing party may seek to require the recipient to:

- Secure each representative’s agreement that the disclosing party may seek recourse directly against that representative for its breach of the confidentiality agreement.
- Cause its representatives to comply with the recipient’s nondisclosure and use obligations.

However, most recipients are unwilling to accept these additional obligations because:

- Recipients rarely have the ability to control the activities of all of their representatives.
- The burden involved in obtaining signed agreements from each representative can be overwhelming.

For more information on drafting and negotiating provisions addressing the use and protection of confidential information, see Standard Document, Confidentiality Agreement: General (Mutual): Section 3 ([1-501-7108](#)) and its related Drafting Note, and Practice Note, Confidentiality and Nondisclosure Agreements (GA): Nondisclosure Obligations ([W-008-9299](#)).

DEFINING REPRESENTATIVES

The definition of “Representatives” is a fundamental term under most confidentiality agreements because the recipient is typically prohibited from disclosing confidential information except

to its representatives. The universe of persons and entities included in this definition should be customized to reflect the facts and circumstances of each recipient’s legal, business, and operational structure, as well as the facts and circumstances of the potential transaction.

To better protect its confidential information, the disclosing party desires to keep this definition as narrow as possible. Conversely, as recipient, each party looks for sufficient flexibility to ensure that all relevant individuals and entities are able to have access to the confidential information without breaching the principal nondisclosure obligation under the agreement.

The second sentence of Section 1 includes certain categories of representatives that are consistently included in this definition, as well as additional categories that may be appropriate to include, depending on applicable legal-, business-, and transaction-related considerations. The parties should include any appropriate optional categories.

2. “**Confidential Information**” means all non-public proprietary or confidential information, including, without limitation, any trade secrets [of Disclosing Party/relating to Disclosing Party’s [DESCRIPTION OF CONFIDENTIAL INFORMATION]], in oral, visual, written, electronic, or other tangible or intangible form, [whether or not marked or designated as “confidential,”/ that, if disclosed in writing or other tangible form, is clearly labeled as “confidential,”/ or if disclosed orally, is identified as confidential when disclosed and within [NUMBER] days thereafter, is summarized in writing and confirmed as confidential,] and all notes, analyses, summaries, and other materials prepared by Recipient or any of its Representatives that contain, are based on, or otherwise reflect, to any degree, any of the foregoing (“**Notes**”); provided, however, that Confidential Information does not include any information that: (a) is or becomes generally available to the public other than as a result of Recipient’s or its Representatives’ [material] breach of this Agreement; (b) is obtained by Recipient or its Representatives on a non-confidential basis from a third party that[, to Recipient’s knowledge,] was not legally or contractually restricted from disclosing such information; (c) [Recipient establishes by documentary evidence,] was in Recipient’s or its Representatives’ possession prior to Disclosing Party’s disclosure hereunder; or (d) [Recipient establishes by documentary evidence,] was or is independently developed by Recipient or its Representatives without using any Confidential Information. Confidential Information also includes (x) the facts that the parties are in discussions regarding the Purpose (or, without limitation, any termination of such discussions) and that Confidential Information has been disclosed; and (y) any terms, conditions, or arrangements discussed.

DRAFTING NOTE: DEFINITION OF CONFIDENTIAL INFORMATION

The definition of “Confidential Information” is another essential component of a confidentiality agreement. The disclosing party generally wants to protect its confidential information with as broad a definition as possible, while the recipient seeks to include a narrower definition to minimize its burden under the agreement. For a discussion as to what is considered confidential information under Georgia law, see Practice Note, Confidentiality and Nondisclosure Agreements (GA): Definition of Confidential Information Under Georgia Law ([W-008-9299](#)).

Some confidential information may also rise to the level of a trade secret and receive automatic protection under state or federal law (see Practice Note, Confidentiality and Nondisclosure Agreements (GA): Trade Secrets ([W-008-9299](#)) and State Q&A, Trade Secret Laws: Georgia: Definition of a Trade Secret ([1-506-1182](#))).

In this short-form mutual agreement, the definition of confidential information:

- Covers information in all types of tangible and non-tangible forms.
- Does not expressly restrict the definition of confidential information to information disclosed after the execution and delivery of the confidentiality agreement.
- Can be customized (using the alternative bracketed language selections) to either:
 - require the discloser to label tangible information and notify the recipient that information disclosed orally is confidential; or
 - more broadly cover information whether or not it is marked or otherwise identified as confidential.
- Includes all notes, analyses, and summaries prepared by the recipient and its representatives that contain any confidential information.
- Extends to:
 - the fact that the parties are in discussions and that confidential information has been disclosed; and
 - any terms, conditions, or arrangements discussed.

Georgia has adopted a modified version of the Uniform Trade Secrets Act (UTSA), the Georgia Trade Secrets Act of 1990 (GTSA) (O.C.G.A. §§ 10-1-760 to 10-1-767). For information discussing how the GTSA and UTSA differ, see Practice Note, Confidentiality and Nondisclosure Agreements (GA): Differences Between the GTSA and the UTSA ([W-008-9299](#)). Congress also enacted the Defend Trade Secrets Act of 2016 (DTSA) (18 U.S.C. § 1836 et seq.), which creates a federal civil cause of action for trade secrets misappropriation. The DTSA substantially overlaps with various state versions of the UTSA, including the GTSA, in terms of elements and definitions, but it preempts no state laws.

For further discussion of trade secrets under the GTSA, see Practice Note, Confidentiality and Nondisclosure Agreements (GA): Georgia Trade Secrets Act ([W-008-9299](#)) and Standard Clauses, General Contract Clauses: Confidentiality (Long Form) (GA): Drafting Note: Trade Secrets ([W-000-0955](#)). For a standard clause incorporating DTSA language, see Standard Clauses, General Contract Clauses: Confidentiality Agreement Clauses After the Defend Trade Secrets Act ([W-002-9194](#)).

BROADER OR NARROWER SCOPE

When drafting and negotiating the definition of confidential information in a mutual confidentiality agreement, each party should consider:

- Whether it is more likely to be the discloser or the recipient.
- The nature and magnitude of the information likely to be disclosed by each party, including whether the information qualifies as a trade secret.
- The party’s willingness to assume administrative and operational obligations regarding the information it receives.

A broader definition of confidential information may provide the disclosing party with greater protection. A court could possibly find an overly broad definition unenforceable under the restrictive covenant

statute enacted by the Georgia legislature in 2011 (O.C.G.A. §§ 13-8-50 to 13-8-59) but Georgia courts can “blue-pencil” an overly broad definition (O.C.G.A. §§ 13-8-53(d) and 13-8-54(b)); for more information on blue-penciling, see Standard Clauses, Confidentiality Agreement: Non-Solicitation Clause (GA): Acknowledgment of Reasonableness; Blue-penciling ([W-008-9294](#)). Still, either party likely to be a discloser of confidential information should consider whether it is feasible to limit this definition depending on the type and extent of information to be disclosed and other relevant facts and circumstances.

Georgia’s restrictive covenant statute (O.C.G.A. §§ 13-8-50 to 13-8-59) only applies to contracts and agreements entered into after May 11, 2011, between or among:

- Employers and employees (as those terms are defined in O.C.G.A. § 13-8-51).
- Distributors and manufacturers.
- Lessors and lessees.
- Partnerships and partners.
- Franchisors and franchisees.
- Sellers and purchasers of a business or commercial enterprise.
- Two or more employers.

(O.C.G.A. § 13-8-52(a).)

For more information on the applicability of the statute, see Practice Note, Confidentiality and Nondisclosure Agreements (GA): Definition of Confidential Information Under Georgia Law ([W-008-9299](#)).

For those commercial contracts that are not listed in Section 13-8-52(a) or that were entered into prior to May 11, 2011, counsel must consult Georgia’s common law for the definition of confidential information. While case law is not well developed in this area, one court has held that a contractual definition of confidential information that encompasses information that is not actually confidential may be unenforceable (see *Nasco v. Gimbert*, 239 Ga. 675, 676-77 (1977)). If a contract is not governed by the restrictive covenant statute, a Georgia court’s ability to blue pencil an overly

broad definition of confidential information is limited. Therefore, the definition of confidential information in the agreement should be clear that it only covers information that both:

- Is unique, proprietary, and confidential to the disclosing party.
- Derives actual or potential commercial value from not being generally or readily ascertainable through independent means.

Section 2 includes optional and alternative language that permits the discloser of confidential information to:

- Retain a broad definition of confidential information, which includes all non-public proprietary or confidential information of the disclosing party.
- Create a more limited definition, which describes the specific types and categories of information that is covered.
- Retain a broad definition, but add a list of specific types and categories of information (for example, information about business affairs, products/services, confidential intellectual property, third-party confidential information, and other sensitive or proprietary information), and clarify that the definition is not limited to the list (see Standard Document, Confidentiality Agreement: General (Mutual): Section 1 ([1-501-7108](#))).

To minimize its own procedural burden, a party more likely to be receiving confidential information wants to narrow this definition. Common restrictions include limiting this definition to confidential information that:

- Is actually disclosed by the disclosing party to the recipient.
- Is disclosed after the parties have entered into the confidentiality agreement.
- If disclosed:
 - in writing or other tangible format, is conspicuously marked as “confidential”; and
 - orally, is confirmed as confidential by the disclosing party in writing within a fixed period of time from the date of initial disclosure (typically between ten and 30 days).

A party more likely to be disclosing confidential information should carefully consider the practical implications of being required to mark all tangible materials confidential and send notice confirming orally disclosed confidential information. Courts only protect a party's trade secrets from unauthorized use or disclosure if that party has taken reasonable efforts or precautions to maintain the information in confidence (O.C.G.A. § 10-1-761(4)(B)).

For example, in *Smith v. Mid-State Nurses, Inc.*, the Georgia Supreme Court held that customer lists were not a trade secret within the meaning of the GTSA. The court found that there was no evidence that showed that the company made reasonable efforts under the circumstances to maintain the confidentiality of the protected information (261 Ga. 208, 208-09 (1991); see also *Diamond Power Int'l, Inc. v. Davidson*, 540 F. Supp. 2d 1322 (N.D. Ga. 2007)). Therefore, if this requirement is included, failing to identify information as confidential may prevent a disclosing party from protecting what would otherwise be considered confidential information.

For more information on defining confidential information, see Standard

Document, Confidentiality Agreement: General (Unilateral, Pro-Discloser): Section 1 ([9-501-6497](#)) and its related Drafting Note, and Practice Note, Confidentiality and Nondisclosure Agreements (GA): Definition of Confidential Information Under Georgia Law ([W-008-9299](#)) and Definition of Confidential Information in the Agreement ([W-008-9299](#)).

EXCLUSIONS FROM CONFIDENTIAL INFORMATION

Section 2 includes standard (but narrowly drafted) exclusions. The party more likely to be receiving confidential information may seek to broaden these exclusions to minimize its operational and administrative burden under the agreement. Common revisions include:

- Eliminating the requirement to provide documentary evidence of information:
 - in its possession before disclosure under the confidentiality agreement; or
 - that is independently developed.
- Adding one or more knowledge qualifiers.

(See, for example, Standard Document, Confidentiality Agreement: General (Short Form, Unilateral, Pro-Recipient): Section 2 ([3-532-3908](#)) and its related Drafting Note.)

3. If Recipient or any of its Representatives is required by [applicable law or] a valid legal order to disclose any Confidential Information, Recipient shall notify Disclosing Party of such requirements so that Disclosing Party may seek, at Disclosing Party's expense, a protective order or other remedy, and Recipient shall reasonably assist Disclosing Party therewith. If Recipient remains legally compelled to make such disclosure, it shall: (a) only disclose that portion of the Confidential Information that it is required to disclose; and (b) use reasonable efforts to ensure that such Confidential Information is afforded confidential treatment.

DRAFTING NOTE: REQUIRED DISCLOSURE

Section 3 is a standard provision that addresses the conditions under which the recipient may disclose the disclosing party's confidential information if it is legally compelled to do so. This short-form provision:

- Can be drafted narrowly for disclosure required by "a valid legal order" or more broadly to also include disclosure required

by applicable law generally (which also permits disclosures required under statutory or regulatory requirements).

- Obligates the recipient to:
 - notify the disclosing party of a required disclosure to give the disclosing party time to seek a protective order or other remedy; and

- reasonably assist the disclosing party in its efforts to do so.
- If the recipient is still required to disclose any confidential information, obligates the recipient to:
 - limit disclosure to that information which the recipient is required to disclose; and
 - use reasonable efforts to obtain confidential treatment for required disclosure.

A party more likely to be the discloser of confidential information may seek to include

language in the second sentence to require the recipient to obtain an opinion of counsel (sometimes in writing) regarding the portion of confidential information it is legally compelled to disclose (see, for example, Standard Document, Confidentiality Agreement: General (Unilateral, Pro-Discloser): Section 6 ([9-501-6497](#))).

The recipient usually tries to soften these obligations (see Standard Document, Confidentiality Agreement: General (Short Form, Unilateral, Pro-Recipient): Section 4 ([3-532-3908](#)) and its related Drafting Note).

4. On Disclosing Party's request, Recipient shall, at [its/Disclosing Party's] discretion, promptly return to Disclosing Party or destroy all Confidential Information in its and its Representatives' possession other than Notes, and destroy all Notes[, and, at Disclosing Party's written request, certify in writing the destruction of such Confidential Information]; provided, however, that Recipient may retain copies of Confidential Information that are stored on Recipient's IT backup and disaster recovery systems until the ordinary course deletion thereof. Recipient shall continue to be bound by the terms and conditions of this Agreement with respect to such retained Confidential Information.

DRAFTING NOTE: RETURN OR DESTRUCTION OF CONFIDENTIAL INFORMATION

Confidentiality agreements typically address when and how the recipient loses its access to the confidential information. In this short-form mutual agreement, Section 4 can be customized to favor either the discloser or the recipient.

A party more likely to be disclosing confidential information should:

- Select the alternative in the first set of bracketed alternative language that grants the disclosing party discretion over whether confidential information is returned or destroyed.
- Consider revising the first sentence to automatically obligate the recipient to return or destroy confidential information at the expiration of the agreement (in addition to requiring return or destruction at any time at the disclosing party's request) (see Standard Document, Confidentiality Agreement: General (Short Form, Unilateral, Pro-Discloser): Section 4 ([5-535-7285](#))).

- Include the second bracketed language selection requiring the recipient to deliver a certificate of destruction (and consider making the delivery of the certificate automatic rather than at the disclosing party's request).
- Consider deleting or narrowing the proviso permitting retention of backup and archival copies.

A party more likely to be receiving confidential information should negotiate to:

- Itself determine whether to return or destroy the confidential information.
- Have the right to redact confidential information contained in notes and other internal work product created by it or its representatives, instead of being required to destroy them.
- If required to deliver a certificate of destruction, obligate the disclosing party to request the certificate as a condition to the recipient's delivery obligation.

- Broaden the scope of the proviso permitting retention of backup copies to include:
 - copies that must be retained under the recipient's document retention policy (for the required duration);
 - documents prepared for the recipient's board of directors (or other similar management group) for purposes of seeking approval or determining not to proceed with the potential transaction; and
 - information retained as required by applicable law (for example, a

party may be required to retain certain internal records that may contain another party's confidential information, such as accounting records or board minutes (see, for example, O.C.G.A. § 14-2-1601(a) (requiring all corporations to maintain, among other records, minutes of all shareholder and board of directors meetings as well as executed consents evidencing actions taken without a meeting)).

- (See, for example, Standard Document, Confidentiality Agreement: General (Short Form, Unilateral, Pro-Recipient): Section 5 ([3-532-3908](#)) and its related Drafting Note.)

5. This Agreement imposes no obligation on either party to disclose any Confidential Information or to negotiate for, enter into, or otherwise pursue the Purpose. Disclosing Party makes no representation or warranty, expressed or implied, as to the accuracy or completeness of the Confidential Information, and will have no liability to Recipient or any other person relating to Recipient's use of any of the Confidential Information or any errors therein or omissions therefrom.

DRAFTING NOTE: NO OBLIGATION TO DISCLOSE OR NEGOTIATE; NO REPRESENTATIONS OR WARRANTIES

Section 5 protects the parties against potential claims that by entering into the confidentiality agreement:

- Either party has accepted an implied obligation to:
 - disclose some or all relevant confidential information; or
 - pursue the potential transaction.

- The disclosing party has made any express or implied representations and warranties about the accuracy and completeness of the confidential information that the recipient may rely on for purposes of negotiating and entering into the potential transaction.

6. [Disclosing Party retains its entire right, title, and interest in and to all Confidential Information, and no disclosure of Confidential Information hereunder will be construed as a license, assignment or other transfer of any such right, title, and interest to Recipient or any other person.]

DRAFTING NOTE: NO TRANSFER OF RIGHTS, TITLE, OR INTEREST

Optional Section 6 is included in many confidentiality agreements to protect the disclosing party against any claims that the recipient was implicitly granted a

license or other right to use the confidential information for any purposes outside the confidentiality agreement.

7. With respect to Confidential Information that constitutes a trade secret under applicable law, the Recipient's rights and obligations under this Agreement shall apply as long as the Confidential Information remains a trade secret under applicable law, and the Recipient's rights and obligations under this Agreement as it relates to Confidential Information that does not constitute trade secrets under applicable law shall apply as long as the Confidential Information remains confidential or two (2) years, whichever is shorter. All other rights and obligations of the parties under this Agreement expire [NUMBER] year[s] after the Effective Date.

DRAFTING NOTE: TERM

This short-form agreement includes a simple term provision, which assumes that:

- All confidential information will be disclosed on or shortly after the execution of the confidentiality agreement.
- The recipient's rights and obligations with respect to information that meets the definition of "trade secret" apply for so long as that information remains a trade secret.
- The recipient's rights and obligations with respect to information that meets the definition of "Confidential Information" but is not a trade secret apply for either:
 - the shorter of two years; or
 - for the time that the information remains confidential.
- The Georgia restrictive covenant statute allows parties to protect information by an agreement as long as it remains confidential (O.C.G.A. §13-8-53(e)). However, the better practice is to include a time limit when possible, as a court may see that as more reasonable to help support enforceability. A time limit of two years is typical in Georgia, but courts have upheld nondisclosure covenants with longer durations (see, for example, *American Software USA, Inc. v. Moore*, 264 Ga. 480, 483 (1994) (upholding a nondisclosure covenant with a ten-year time limit)).
- All other rights and obligations of the parties expire after a stated period of time following the effective date of the agreement (commonly, from one to five years), regardless of when the information is actually disclosed. The parties should select a term length that is appropriate under the circumstances. While disclosing parties usually seek longer terms, recipients are likely to object to any period

that is longer than is reasonably necessary to protect the type of information that is being disclosed

As an alternative, if the parties are not able to agree on a stated period of time, they could provide that the provisions, restrictions, and obligations under Sections 1, 2, and 8 shall survive the expiration or termination of this agreement.

This provision has been drafted to address those situations where the disclosing party is concerned about maintaining the trade secret status of disclosed information meeting the statutory definition. Trade secret status requires that a party has made reasonable efforts to maintain the secrecy of the information (O.C.G.A. § 10-1-761(4)(b); see also *Smith v. Mid-State Nurses*, 261 Ga. at 208 and *Diamond Power Int'l*, 540 F. Supp. 2d at 1322).

Alternative term structures include:

- A set agreement term, often from one to three years, during which it is expected that confidential information will or may be disclosed (either continuously or from time to time) and a discrete survival period for the recipient's confidentiality obligations, often for an additional one-to-three-year period, which may begin on:
 - the expiration or termination of the term; or
 - the date on which the particular confidential information is disclosed.
- An indefinite term without a stated survival period.
- An indefinite or stated term with a perpetual survival period.
- A term that ends on a specified date or on the occurrence of certain events or conditions, such as the conclusion of the

defined business purpose or the signing of a principal agreement.

Some confidentiality agreements also permit one or both parties to terminate the term of the agreement before its contractual expiration date under certain circumstances.

For more information on term and termination, see Standard Document, Confidentiality Agreement: General (Unilateral, Pro-Discloser): Section 8 ([9-501-6497](#)).

8. Recipient acknowledges and agrees that any breach of this Agreement will cause injury and irreparable harm to Disclosing Party for which money damages would be an inadequate remedy and that, in addition to remedies at law, Disclosing Party is entitled to equitable relief as a remedy for any such breach or potential breach, including without limitation, injunctive relief without the posting of bond or other security. Recipient waives any claim or defense that Disclosing Party has an adequate remedy at law in any such proceeding. Nothing herein shall limit the equitable or available remedies at law for Disclosing Party.

DRAFTING NOTE: EQUITABLE RELIEF

Because of the potentially serious consequences of an unauthorized disclosure by a recipient and the difficulty of ascertaining monetary damages in that event, confidentiality agreements usually include a provision acknowledging the parties' agreement that the disclosing party should be entitled to obtain injunctive (or more broadly, equitable) relief, in addition to other available remedies, for a breach of the recipient's confidentiality obligations (see Practice Note, Provisional Remedies: Initial Considerations for Injunctive Relief (GA) ([W-000-2954](#)) and Practice Note, Confidentiality and Nondisclosure Agreements (GA): Equitable Relief ([W-008-9299](#))). Georgia courts recognize that the potential disclosure of confidential information creates a risk of injury that would be difficult to measure or remedy by a damages award, making injunctive relief appropriate (see, for example, *Poe & Brown, Inc. v. Gill*, 268 Ga. 749, 750 (1997)).

Absent a specific statutory right to the contrary, the granting of equitable relief is solely in the court's discretion. Because of this judicial discretion, an equitable remedies clause cannot compel a court's decision,

but should carry evidentiary weight as an expression of the parties' intentions. For more information on equitable remedies provisions, see Standard Clauses, General Contract Clauses: Equitable Remedies ([6-518-8602](#)).

In some confidentiality agreements, the disclosing party also tries to include a provision permitting recovery of attorneys' fees and court costs by the prevailing party to any litigation (see, for example, Standard Clauses, General Contract Clauses: Litigation Costs and Expenses (GA) ([W-000-1487](#))). Because the disclosing party is more likely to sue the recipient for breach of the confidentiality agreement, a party more likely to be receiving than disclosing confidential information often resists including an attorneys' fees provision. However, for trade secret violations, both the GTSA and the DTSA provide for the recovery of attorneys' fees in certain circumstances (O.C.G.A. § 10-1-764 and 18 U.S.C.A. § 1836(b)(3)(D)).

For a sample attorneys' fees provision, see Standard Document, Confidentiality Agreement: General (Unilateral, Pro-Discloser): Section 14 ([9-501-6497](#)).

9. This Agreement and all related documents [including all exhibits attached hereto][, and all matters arising out of or relating to this Agreement, whether sounding in contract, tort, or statute] are governed by, and construed in accordance with, the laws of the State of Georgia, United

States of America [(including its statutes of limitations)], without giving effect to the conflict of laws provisions thereof to the extent such principles or rules would require or permit the application of the laws of any jurisdiction other than those of the State of Georgia].

DRAFTING NOTE: CHOICE OF LAW

This section allows parties to choose the substantive law of Georgia to apply to the contract. Parties typically try to maintain consistency regarding governing law, jurisdiction, and venue across all transactions they undertake together. Because the confidentiality agreement is often the first document that the parties execute, each party should carefully consider the selection of state law and forum.

Georgia courts do not enforce a choice of law provision in a restrictive covenant agreement that calls for the law of another jurisdiction to apply when the foreign jurisdiction's law contravenes the public policy of the state of Georgia. This includes agreements containing a nondisclosure provision. (See *Convergys Corp. v. Keener*, 276 Ga. 808, 808-09 (2003); see also *Hostetler v. Answerthink, Inc.*, 267 Ga. App. 325, 327 (2004).)

While less of a concern since the adoption of the restrictive covenant statute in 2011, parties need to be aware of this issue, particularly where the common law, rather than the restrictive covenant statute applies. For more information, see Practice Note, Confidentiality and Nondisclosure Agreements (GA): Governing Law, Jurisdiction, and Venue ([W-008-9299](#)).

For more information on the optional language in brackets, see Standard Clause, General Contract Clauses: Choice of Law (GA): Drafting Notes ([W-000-0988](#)):

- Extra-Contractual Matters ([W-000-0988](#)).
- Statutes of Limitations ([W-000-0988](#)).
- Choice of Law Rules ([W-000-0988](#)).

For more information on drafting and negotiating choice of law clauses, see Practice Note, Choice of Law and Choice of Forum: Key Issues ([7-509-6876](#)).

10. Each Party irrevocably and unconditionally agrees that it will not commence any action, litigation, or proceeding of any kind whatsoever against the other Party in any way arising from or relating to this Agreement, including all exhibits, schedules, attachments, and appendices attached to this Agreement, and all contemplated transactions[, including, but not limited to, contract, equity, tort, fraud, and statutory claims], in any forum other than the US District Court for the [Northern/Middle/Southern] District of Georgia or[, if such court does not have subject matter jurisdiction,] the courts of the State of Georgia sitting in [POLITICAL SUBDIVISION], and any appellate court from any thereof. Each Party irrevocably and unconditionally submits to the exclusive jurisdiction of such courts and agrees to bring any such action, litigation, or proceeding only in the US District Court for the [Northern/Middle/Southern] District of Georgia or[, if such court does not have subject matter jurisdiction,] the courts of the State of Georgia sitting in [POLITICAL SUBDIVISION]. Each Party agrees that a final judgment in any such action, litigation, or proceeding is conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

DRAFTING NOTE: CHOICE OF FORUM

In this section, the parties confer personal jurisdiction on the courts of Georgia and agree that Georgia is the exclusive forum for bringing any claims under (and

sometimes, more broadly relating to) the agreement. For more information on drafting and negotiating choice of forum clauses, see Standard Clauses, General

Contract Clauses: Choice of Forum (GA) ([W-000-0986](#)) and Practice Note, Choice of Law and Choice of Forum: Key Issues ([7-509-6876](#)).

In Georgia, the general rule is that “[a] defendant is entitled to be sued in the county of his [or her] residence” (Ga. Const. art. VI, § 2, ¶ VI); see also *Barnett v. Quinn*, 227 Ga. App. 172, 174 (1997)). Forum selection clauses which purport to mandate venue or forum in a different county have been held to violate the Georgia Constitution and to be unenforceable (see *Huddle House, Inc. v. Paragon Foods, Inc.*, 263 Ga. App. 382, 383 (2003) and *Fidelity & Deposit Co. v. Gainesville Iron Works*, 125 Ga. App. 829, 830 (1972)). Therefore, where a contracting party is a resident of Georgia, a clause providing for forum in a county other than the contracting party’s county of residence may not be enforced.

Although forum selection provisions are prima facie valid and presumptively enforceable in Georgia, similar to choice of law issues, the parties need to be aware of the issues relating to choice of forum where they select a law other than Georgia. For more information, see Practice Note, Confidentiality and Nondisclosure Agreements (GA): Governing Law, Jurisdiction, and Venue ([W-008-9299](#)).

To settle or avoid protracted forum selection negotiations, the parties sometimes elect to include a floating forum selection clause that forces a party initiating litigation to do so in the home jurisdiction of the counterparty being sued. For a sample floating forum selection clause, see Standard Clauses, General Contract Clauses: Choice of Forum (Floating: Reciprocal) (GA) ([W-000-0987](#)).

If the parties prefer to resolve disputes by arbitrating rather than litigating them,

then this provision must be replaced with an arbitration clause. Parties in Georgia may have an added incentive to consider arbitration, as in Georgia, pre-litigation contractual waivers of the right to trial by jury are not enforceable (*Bank S., N.A. v. Howard*, 264 Ga. 339, 340 (1994)). In other jurisdictions, commercial agreements like the present one frequently include jury waiver provisions. Many sophisticated parties prefer that a judge, or in the absence of a judge, an arbiter, hear and decide any dispute arising out of a complex agreement rather than a jury which may not appreciate or understand the potentially complex issues involved in the litigation. For more information on arbitration and other alternative dispute resolution agreements, including sample clauses, see:

- Practice Note, Drafting Arbitration Agreements calling for Arbitration in the US ([2-500-4624](#)).
- Practice Note, Standard recommended arbitration clauses ([1-381-8470](#)).
- Standard Clauses, Clauses for the AAA, ICDR, ICC, and UNCITRAL Arbitration ([6-502-3569](#)).
- Drafting Contractual Dispute Provisions Toolkit (GA) ([W-009-3335](#)).

This Standard Document does not contain a dispute resolution escalation provision, which is more commonly used in long-term master service agreements. Escalation provisions first require the parties to resolve their disputes by alternative dispute resolution (ADR), including a period of negotiation and then mediation before submitting the dispute to litigation or ad hoc arbitration. For more information on drafting and negotiating escalation clauses, see Standard Clauses, General Contract Clauses, Alternative Dispute Resolution (Multi-Tiered) (GA) ([W-008-2627](#)).

11. All notices must be in writing and addressed to the relevant party at its address set forth in the preamble (or to such other address as such party specifies in accordance with this Section 11). All notices must be personally delivered or sent prepaid by nationally recognized courier or certified or registered mail, return receipt requested, and are effective upon actual receipt.

DRAFTING NOTE: NOTICES

Under a confidentiality agreement, notices are used for significant communications (such as requesting the return or destruction of confidential information or notifying the disclosing party of a required disclosure). This notice provision does not permit email and fax notices because:

- It is not always possible to track with certainty when an email has been received.
- There may be a greater risk of an email being intercepted by a third party, arriving

late or not at all, or being inadvertently deleted or overlooked by the intended recipient.

- Even when the sender receives a fax confirmation, the recipient may not have actually received and read the fax.

For more information on notices, see Standard Clause, General Contract Clauses: Notice ([6-533-1025](#)).

12. This Agreement constitutes the entire agreement of the parties with respect to its subject matter, and supersedes all prior and contemporaneous understandings, agreements, representations, and warranties, whether written or oral, with respect to such subject matter. This Agreement may only be amended, modified, waived, or supplemented by an agreement in writing signed by both parties.

DRAFTING NOTE: ENTIRE AGREEMENT AND OTHER MISCELLANEOUS CLAUSES

An entire agreement clause (also referred to as a merger or integration clause) protects against liability from representations or warranties other than those included in the agreement. For more information, see Standard Clause, General Contract Clauses: Entire Agreement (GA) ([W-009-4816](#)).

Although this is a short form agreement, the parties should consider including additional clauses (see, for example, Standard Clauses, General Contract Clauses: Severability (GA) ([W-000-0973](#)), Waivers (GA) ([W-000-0914](#)), and Successors and Assigns (GA) ([W-002-4375](#))).

In executing the agreement, the parties may also want to include:

- A counterparts clause.
- Restrictions on assignment by either party.
- The ability to amend the agreement with the consent of both parties.
- If corporate parties, authority that the person signing the agreement has the authority to bind the corporation or other entity to the terms of the agreement.

For more information, see Standard Clauses, General Contract Clauses: Counterparts ([5-564-9425](#)), General Contract Clauses: Assignment and Delegation (GA) ([W-000-0989](#)), General Contract Clauses: Amendments (GA) ([W-000-0916](#)), and General Contract Clauses: Representations and Warranties: Sections 1.1(d) ([2-519-9438](#)) and 1.2(d).

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the Effective Date hereof.

[PARTY A NAME]

[PARTY B NAME]

By _____

By _____

Name:

Name:

Title:

Title:

ABOUT PRACTICAL LAW

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at legalsolutions.com/practical-law. For more information or to schedule training, call **1-800-733-2889** or e-mail referenceattorneys@tr.com.

Confidentiality Agreement: Non-Solicitation Clause (GA)

BENJAMIN I. FINK AND NEAL F. WEINRICH, BERMAN FINK VAN HORN P.C.,
WITH PRACTICAL LAW COMMERCIAL TRANSACTIONS

Search the [Resource ID numbers in blue](#) on Westlaw for more.

A standard restrictive covenant, governed by Georgia law, for use in a confidentiality or nondisclosure agreement between parties to a potential commercial transaction covering non-solicitation of employees, and including an optional sub-clause covering non-solicitation of customers and suppliers. This Standard Clause has integrated drafting notes with important explanations and drafting tips.

DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

Parties evaluating and negotiating many types of prospective commercial transactions commonly enter into confidentiality agreements (also known as nondisclosure agreements or NDAs) to:

- Preserve the confidentiality of sensitive non-public information disclosed by one or both parties to the other.
- Restrict the recipient's use of the other party's confidential information except for limited purposes relating to the evaluation and negotiation of the proposed transaction.

For sample unilateral and mutual confidentiality agreements, see Confidentiality and Nondisclosure Agreements Toolkit ([3-502-1883](#)). For information on confidentiality agreements in Georgia, including a sample short form, see Practice Note, Confidentiality and Nondisclosure Agreements (GA) ([W-008-9299](#)) and Standard Document, Confidentiality

Agreement: General (Short Form, Mutual) (GA) ([W-008-9296](#)).

If the parties to the confidentiality agreement are business competitors, the disclosing party is often also concerned that, during the evaluation or negotiation process, the recipient may:

- Become aware of or come into contact with the disclosing party's key executives and other employees.
- Obtain information about the disclosing party's customers, suppliers, or both.
- Based on these contacts and this information:
 - solicit or offer employment to the disclosing party's employees (often referred to as poaching or raiding); or
 - use the confidential information to divert business away from the disclosing party or otherwise interfere with the disclosing party's relationships with its customers and suppliers.

To address this concern, disclosing parties often insist on including a non-solicitation clause in the confidentiality agreement.

A non-solicitation clause is a form of restrictive covenant that prohibits the recipient (and sometimes its affiliates and representatives), for a limited period of time, from:

- Soliciting for employment (and sometimes hiring of) some or all of the disclosing party's employees.
- Inducing some or all of the disclosing party's customers or suppliers to alter their business arrangements with the disclosing party (and sometimes soliciting business from the customer or supplier).

Most non-solicitation provisions include exceptions to these broad restrictions (see Employee Non-Solicitation Clauses and Customer and Supplier Non-Solicitation Clauses) to support their enforceability (see Enforceability).

In addition to considering enforceability as a matter of Georgia law, agreements that restrain competition implicate federal antitrust laws. For general information on US antitrust law, see Practice Note, US Antitrust Laws: Overview ([9-204-0472](#)). For more information on antitrust issues involving dealings between competitors, see Practice Note, Competitor Collaborations in the US ([0-202-2806](#)). For a discussion on the federal antitrust implications of non-compete clauses in employment agreements, see Practice Note, Antitrust Considerations in Employment Agreement Non-Compete Clauses ([W-002-2106](#)).

ENFORCEABILITY

The enforceability of non-solicitation clauses is dependent on state law. However, there is little case law or legal commentary in Georgia that speaks directly to the enforcement of non-solicitation clauses in confidentiality agreements between two potential parties to a commercial transaction. Instead, most of the cases address these provisions in the context of:

- Employment (where employees are subject to post-employment non-solicitation obligations).
- The sale of a business (where the seller is restricted from soliciting employees,

customers, or suppliers of its former business after the deal has closed).

In 2011, Georgia enacted the restrictive covenant statute (O.C.G.A. §§ 13-8-50 to 13-8-59) that explicitly applies to contracts or agreements entered into after May 11, 2011, between or among:

- Employers and employees.
- Distributors and manufacturers.
- Lessors and lessees.
- Partnerships and partners.
- Franchisors and franchisees.
- Sellers and purchasers of a business or commercial enterprise.
- Two or more employers.

(O.C.G.A. § 13-8-52(a).)

The statement that the statute applies to agreements between "two or more employers" could mean that the statute applies to any agreement between two businesses unless one of the businesses does not have any employees. However, currently there are no reported decisions from the Georgia appellate courts on this issue.

Section 13-8-52(b) states that the restrictive covenant statute does **not** apply to any contract or agreement not described in Section 13-8-52(a) (O.C.G.A. § 13-8-52(b)). Therefore, the statute may not apply, for example, to:

- A software licensing agreement.
- A sales contract.
- An agreement to provide services to a customer.
- Other types of agreements not listed in the statute.

However, if both parties to these types of agreements happen to be employers, it could be argued that the agreement is between two or more employers.

Section 13-8-53(b) governs customer non-solicitation covenants in the employment context. This statute allows for restrictions on affirmative solicitation of the employer's customers and prospects with whom the employee had material contact during employment for purposes of providing products or services competitive with the employer's business (O.C.G.A. § 13-8-53(b)).

A customer non-solicitation covenant in the employment context does not need to have a geographic limitation if it is limited to customers with whom the employee had “material contact” (as defined in the statute) (O.C.G.A. § 13-8-53(b)).

Although the restrictive covenant statute does not specifically address employee non-solicitation covenants outside of the employment context, it does define a “restrictive covenant” to include an agreement that protects a party’s “interest in... employees” (O.C.G.A. § 13-8-51(15)). Therefore, arguably the rules in the statute governing other restrictive covenants apply to employee non-solicitation covenants, although the statute is not entirely clear with respect to this issue.

Georgia’s common law govern non-solicitation provisions in commercial contracts that do not fall within either:

- The types of agreements listed in Section 13-8-52(a).
- Agreements entered into prior to May 11, 2011.

Georgia’s common law contains strict rules to enforce customer non-solicitation covenants. For example, in *Trujillo v. Great S. Equip. Sales, LLC*, the court struck down a customer non-solicitation covenant that covered customers that the employee learned confidential information about, but with whom the employee did not have material contact (289 Ga. App. 474, 476-78 (2008)). Courts more liberally enforce employee non-solicitation covenants under Georgia’s common law (see, for example, *CMGRP, Inc. v. Gallant*, 343 Ga. App. 91, 94-99 (2017)).

Most of the cases and the legal commentary address non-compete provisions that restrain the ability to engage in competitive activities generally. This type of restrictive covenants almost always have a greater anticompetitive effect than non-solicitation provisions relating to restraints on the recruitment or solicitation of:

- Employees.
- Independent Contractors.
- Customers.
- Suppliers.
- Vendors.

(O.C.G.A. §§ 13-8-50 to 13-8-59; see also State Q&A, Non-Compete Laws: Georgia (9-505-9156)).

State laws vary on the enforceability of non-competes. Georgia enforces them under appropriate facts and circumstances (see, for example, *Novelis Corp. v. Smith*, 2017 WL 1745635, at *6-7 (N.D. Ga. Mar. 10, 2017)). Georgia courts scrutinize restrictive non-solicitation provisions in a similar manner (see, for example, *PointeNorth Ins. Grp. v. Zander*, 2011 WL 4601028, at *3 (N.D. Ga. Sept. 30, 2011)).

When considering the enforceability of a non-compete or a more restrictive non-solicitation provision, under both common law and the restrictive covenant statute Georgia courts focus on whether the restrictions:

- Serve a legitimate business interest.
- Are reasonable in duration and geographic scope.
- Define the restricted activity no more broadly than is necessary to protect the disclosing party’s interests.

In Georgia, for agreements covered by Section 13-8-52(a), legitimate business interests include, but are not limited to:

- Trade secrets.
- Valuable confidential information that otherwise does not qualify as a trade secret.
- Substantial relationships with specific prospective or existing customers, patients, vendors, or clients.
- Customer, patient, or client good will associated with:
 - an ongoing business, commercial, or professional practice, including, but not limited to, by way of trade name, trademark, service mark, or trade dress;
 - a specific geographic location; or
 - a specific marketing or trade area.
- Extraordinary or specialized training.

(O.C.G.A. § 13-8-51(9); see also *Novelis*, 2017 WL 1745635, at *8.)

Employee Non-Solicitation Clauses

Georgia courts have traditionally enforced employee non-solicitation clauses more

liberally than customer non-solicitation covenants and non-competes. For example, in *CMGRP, Inc.*, the court stated that an employee non-solicitation clause does not need to have a geographical limitation or be limited to those employees with whom the former employee had material contact or an established relationship to be enforceable (343 Ga. App. at 94-99). Enforcement is more likely if the clause is both:

- Limited in duration.
- Captures a narrow universe of affected employees.

(See Drafting Note, Defining the Protected Employees.)

When assessing restrictiveness, the parties should consider the industry in which they operate. If there are relatively few individuals who are qualified to perform particular roles, Georgia courts may treat the employee non-solicitation as a non-compete due to its:

- Increased anticompetitive effect.
- Impact on the affected employees.

Customer and Supplier Non-Solicitation Clauses

Customer and supplier non-solicitation clauses generally have a greater anticompetitive effect. Outside of the employment context, they are most commonly used when business competitors are discussing a potential commercial arrangement. While the disclosing party should protect its competitive business information, the recipient should also protect its competitive position by avoiding unnecessary constraints on its business activities. Therefore, Georgia courts scrutinize these restrictions in the same way they consider other restrictive covenants (for example, a non-compete).

When entering into a confidentiality agreement, the disclosing party should carefully consider whether a customer and supplier non-solicitation provision is necessary. If so, counsel should pay particular attention to enforceability concerns.

Equitable Remedies

If the recipient breaches a non-solicitation clause, in addition to or instead of pursuing

monetary damages, the disclosing party typically seeks an injunction ordering the breaching party to cease its actions (see Practice Note, Provisional Remedies: Initial Considerations for Injunctive Relief (GA) ([W-000-2954](#))). While monetary damages are available to a prevailing party as a matter of legal right, US courts have complete discretion over whether to grant an equitable remedy, including injunctive relief (see, for example, *Rigby v. Boatright*, 330 Ga. App. 181, 182 (2014)).

To support the disclosing party's application for injunctive relief, the parties should include an equitable remedies clause in the confidentiality agreement that expressly includes the recipient's:

- Acknowledgment that the monetary damages are insufficient to remedy a breach.
- Intention that the disclosing party is entitled to obtain equitable remedies.

For more information on equitable remedies and equitable remedies clauses, see Practice Note, Contracts: Equitable Remedies ([0-519-3197](#)) and Standard Clauses, General Contract Clauses: Equitable Remedies ([6-518-8602](#)).

ASSUMPTIONS

This Standard Clause assumes that:

- **The agreement is governed by Georgia law.** If the law of another state applies, these terms may have to be modified to comply with the laws of the applicable jurisdiction.
- **There are two parties to the confidentiality agreement.** This provision must be revised if there are multiple parties to the agreement. For example, multiple recipients must determine whether their obligations are joint, several, or joint and several and amend this clause accordingly. For an example of a provision for several and joint and several liability, see Standard Clauses, General Contract Clauses: Joint and Several Liability (GA) ([W-000-1092](#)).
- **The parties to the agreement are US entities and the transaction takes place in the US.** If any party is organized or operates in, or any part of the transaction

takes place in a foreign jurisdiction, these terms may have to be modified to comply with applicable laws in the relevant foreign jurisdiction.

- **These terms are being used in a business-to-business transaction.** This Standard Clause should not be used in a consumer contract, which may involve legal and regulatory requirements and practical considerations that are beyond the scope of this resource. This Standard Clause also should not be used in the employment context, as that may involve other requirements and practical considerations that are beyond the scope of this resource.
- **These terms are not industry-specific.** This Standard Clause does not account for any industry-specific laws, rules, or

regulations that may apply to certain transactions, products, or services.

- **Capitalized terms are defined elsewhere in the agreement.** Certain terms are capitalized but not defined in this Standard Clause because they are defined elsewhere in the agreement (for example, Affiliates). The parties should revise or replace these defined terms as necessary to preserve consistency with other provisions of the confidentiality agreement.

BRACKETED ITEMS

Bracketed items in ALL CAPS should be completed with the facts of the transaction. Bracketed items in sentence case are either optional provisions or include alternative language choices, to be selected, added, or deleted at the drafter's discretion.

1. Non-Solicitation. Except as may be provided in any [Transaction Document/Definitive Agreement/definitive written agreement between the Parties entered into after the date hereof], [each Party/the Recipient/[DEFINED TERM FOR PARTY 2]] agrees that [during the Term [and for a period of [NUMBER] [month[s]/year[s]] after the expiration or earlier termination of the Term]/for a period of [NUMBER] [months/year[s]] after the Effective Date], without obtaining the prior written consent of [the other Party/the Disclosing Party/[DEFINED TERM FOR PARTY 1]], neither [such Party/the Recipient/[DEFINED TERM FOR PARTY 2]] nor any of its [Affiliates or] Representatives (each, a "**Restricted Person**") shall directly or indirectly, for itself or on behalf of another [Person/person or entity]:

DRAFTING NOTE: NON-SOLICITATION

The Standard Clause includes an employee non-solicitation provision (Section 1(a)) and an optional customer and supplier non-solicitation provision (Section 1(b)). Both clauses contain optional and alternative language selections that permit the parties to customize their draft. When customizing these provisions, the parties should:

- Consider Georgia law and how it may apply to:
 - the particular facts and circumstances of the contract; and
 - the proposed restrictions.
- Consider whether the agreement is of the type covered by O.C.G.A. § 13-8-52(a) and, if not, what case law is

applicable to determine the enforceability of the covenant (see Drafting Note, Enforceability). For additional information regarding the types of agreements covered by O.C.G.A. § 13-8-52(a), see Practice Note, Confidentiality and Nondisclosure Agreements (GA): Non-Solicitation ([W-008-9299](#)).

- Draft the language of these provisions to support enforceability.

Non-solicitation clauses are often the most heavily negotiated section of any confidentiality agreement. Many recipients object to these provisions and it is common to limit and qualify their terms during the negotiation process.

MUTUAL VERSUS UNILATERAL NON-SOLICITATION OBLIGATION

Non-solicitation clauses are usually drafted unilaterally to protect the disclosing party. In some situations (especially if the two parties are competitors), it may be appropriate for the employee non-solicitation to apply to both parties. Also, if the confidentiality agreement is mutual and both parties are supplying confidential information, circumstances may support a mutual non-solicitation provision. However, the parties should be aware that a mutual obligation has a greater anticompetitive effect and is more likely to be:

- Challenged by the antitrust agencies or private parties (see Practice Note, Antitrust Considerations in Employment Agreement Non-Compete Clauses: Analysis of Non-Compete Clauses Under the Federal Antitrust Laws ([W-002-2106](#))).
- Characterized as per se (automatically) illegal if it is not necessary to a pro-competitive collaboration (see Practice Note, Competitor Collaborations in the US: The Ancillary Restraint Doctrine: Testing Restrictions on Venture or Parent Operations ([O-202-2806](#))).

This Standard Clause includes alternative language selections that can be used for either a unilateral or a mutual clause. It assumes that Section 1(a) and Section 1(b) are treated similarly. If the parties agree, for example, to make the employee non-solicitation mutual but to draft the customer and supplier non-solicitation unilaterally in favor of the disclosing party, they must divide this Standard Clause into two separate sections to individually address the formulation of restricted persons in each section.

TERM OF THE NON-SOLICITATION OBLIGATION

Most non-solicitation obligations are effective for a period that may be shorter than the term of the parties' overall confidentiality obligations. In many cases, non-solicitation terms are for one or two years. Selecting a shorter duration:

- Limits its anticompetitive effects.
- Helps to support enforceability.

This Standard Clause assumes that the non-solicitation period is the same for the employee non-solicitation and the customer and supplier non-solicitation. If the parties agree to apply different terms to each of these obligations, they must revise this Standard Clause to create a separate non-solicitation period within each of the clauses.

Disclosing Party

In Georgia, non-solicitation terms of three years or less are presumed to be reasonable in many commercial agreements (not including those related to the sale of a business) (O.C.G.A. § 13-8-57(c)). Because recipients consistently try to negotiate for a shorter term, the disclosing party should consider whether to specify a longer term in the first draft (such as four years), which includes some cushion to protect its desired end result. However, proposing a term longer than the one presumed to be reasonable in the statute may not be well-received by the other party, unless a specific reason for doing so can be articulated. Moreover, given that the three years is a rebuttable presumption, the restraint should be no longer than reasonably necessary to protect the relevant interest.

Recipient

The recipient should try to restrict the term to one year or less.

DEFINING THE RESTRICTED PERSONS

A key element of a non-solicitation clause is the universe of persons subject to its restrictions. In addition to the recipient, different formulations also include the recipient's:

- Representatives.
- Subsidiaries.
- Affiliates.
- Subsidiaries or affiliates and representatives.

When drafting this provision, the parties should consider relevant commercial and contractual facts and circumstances, including:

- Whether the recipient has the right to disclose any confidential information to its

representatives, its affiliates, or both (and which of the recipient's representatives and affiliates is actually likely to receive any confidential information).

- The type of business conducted by the recipient's affiliates (and whether it is even likely that any of the recipient's affiliates might otherwise pursue any of the restricted activities).
- How broadly or narrowly "Covered Persons" and "Customers and Suppliers" are defined (and whether these definitions increase the possibility that the recipient's affiliates might pursue any of the restricted activities).
- The scope of "Affiliates" and "Representatives" if these terms are defined in the confidentiality agreement (and whether the defined term for "Representatives" includes a party's subsidiaries and other affiliates).
- Each party's relative bargaining leverage.

Disclosing Party

Disclosing parties commonly aim to broadly define the universe of restricted persons to include the recipient and its affiliates and other representatives. (The bracketed term "Affiliates or" should be omitted if the definition of "Representatives" in the confidentiality agreement includes the recipient's affiliates.) Even if the recipient is successful in excluding some or all of its affiliates and representatives from this definition, the disclosing party should insist on including the recipient and its officers, employees, and directors to avoid any disagreement over whether the acts of a particular individual were taken on behalf of the entity.

Recipient

The recipient aims to define the restricted persons as narrowly as possible. A key concern to the recipient is to avoid liability for the actions of those individuals and entities beyond its legal or practical control. However, the disclosing party often has a legitimate interest in extending these obligations beyond the recipient itself.

If the recipient cannot completely exclude its affiliates and other representatives, it

should consider some or all of the following limitations:

- Excluding the recipient's legal and financial representatives, unless they are acting on behalf of the recipient or its affiliates in making the solicitation.
- Restricting covered affiliates to specified affiliates of the recipient that are competitors of the disclosing party or expressly excluding any affiliates that operate in different business sectors.
- Excluding any of the recipient's representatives that do not actually receive any confidential information.
- Excluding any affiliates (and their representatives) that do not actually receive any confidential information.

In practice, the recipient may have to agree to restrictions on the persons who are entitled to receive access to the confidential information (such as its affiliates and their representatives) to be able to negotiate limitations on the definition of restricted persons.

Enforcing Breaches Committed by Non-Parties

If the restricted persons include the affiliates or other representatives of the recipient, the disclosing party must consider that, as non-parties to the agreement, affiliates and representatives are not bound by this restriction unless they either:

- Execute a document agreeing to be bound.
- Sign on to the contract for that limited purpose.

If they are not bound, the disclosing party cannot bring a claim against an affiliate or representative that fails to comply with its non-solicitation obligation. Many confidentiality agreements include a general term deeming the recipient liable for any breaches of the confidentiality agreement committed by its affiliates or representatives. Others go further and require each individual receiving any confidential information to agree in writing to be bound by these restrictions.

If either of these terms is not included, the disclosing party should negotiate language

into the non-solicitation provision that provides for a potential source of recourse (for example, “[The Recipient/Each Party/[DEFINED TERM FOR PARTY 2]] shall be

liable for any failure of its [[A/a]ffiliates or representatives/Representatives] to comply with the restrictions set out under this Section [NUMBER].”).

(a) solicit for employment or otherwise induce, influence, or encourage to terminate employment with [the other Party/the Disclosing Party/[DEFINED TERM FOR PARTY 1]] [or any of its [Affiliates/subsidiaries]][,] [or employ [or engage as an independent contractor],] any [person listed on Schedule 1 attached hereto/[current or former] employee of [the other Party/the Disclosing Party/[DEFINED TERM FOR PARTY 1]] [or any of its [Affiliates/subsidiaries]] [with a title of or equivalent to [JOB TITLE(S)] or above]][,] [with whom the Restricted Person had [more than incidental] contact or who became known to the Restricted Person in connection with the [Transaction/Proposed Transaction/Purpose] or the evaluation thereof] (each, a “**Covered Employee**”), except (i) pursuant to a general solicitation through the media [or by a search firm, in either case,] that is not directed specifically to any employees of [the other Party/the Disclosing Party/[DEFINED TERM FOR PARTY 1]], unless such solicitation is undertaken as a means to circumvent the restrictions contained in or conceal a violation of this Section 1(a) or (ii) if [the other Party/the Disclosing Party/[DEFINED TERM FOR PARTY 1]] terminated the employment of such Covered Employee before the Restricted Person having solicited or otherwise contacted such Covered Employee or discussed the employment or other engagement of the Covered Employee[; or/]

DRAFTING NOTE: NON-SOLICITATION OF EMPLOYEES

In addition to establishing duration and specifying the universe of restricted persons (see Drafting Notes, Term of the Non-Solicitation Obligation and Defining the Restricted Persons), the key terms of an employee non-solicitation define:

- The universe of protected employees.
- The restricted activity.

DEFINING THE PROTECTED EMPLOYEES

The definition of covered employees is essential to any employee non-solicitation provision. In practice, these definitions range from covering a few to all of a disclosing party’s and its affiliates’ employees. The definition chosen should be specific to the facts and circumstances presented by the commercial transaction to which the agreement is ancillary. Different formulations include:

- Specific named employees of the disclosing party (and sometimes those of its subsidiaries or affiliates).

- All or certain categories of employees of the disclosing party (and sometimes those of its subsidiaries or affiliates) that the recipient:
 - became aware of (from confidential information or otherwise, even on a no-name basis) in connection with the proposed transaction and the evaluation process; or
 - had contact with in connection with the proposed transaction and the evaluation process.
- All officers and executives of the disclosing party (and sometimes those of its subsidiaries or affiliates).
- All employees of the disclosing party (and sometimes those of its subsidiaries or affiliates) at or above a stated position or executive level.
- All employees of the disclosing party (and sometimes those of its subsidiaries or affiliates).

The parties must revise this Standard Clause to reflect their agreed formulation by selecting the appropriate optional and alternative language.

Disclosing Party

Many disclosing parties try to protect all of their employees. However, to support enforceability, the disclosing party should consider limiting this protection to:

- Key executives.
- Employees (of the disclosing party and any of its subsidiaries or affiliates) that the recipient had any contact with or became aware of (even on a no-name basis) during the evaluation and negotiation process.

The disclosing party should also consider whether to add language clarifying that covered employees include both current and former employees. Without this clarification, the restriction may be deemed ambiguous if a solicitation or hiring occurs after an employee who otherwise satisfies the definition of covered employee ceases to be employed by the disclosing party. Usually, this language should be acceptable to the recipient if:

- The universe of covered employees is limited (for example, to key senior executives).
- The clause contains a standard exception for soliciting or hiring employees that are terminated by the disclosing party (see Exceptions to the Restricted Activity).
- The restraint with respect to former employees expires after a certain period time following the employee's voluntary resignation (for example, the restraint covers any person formerly employed by the disclosing party within X months preceding such employee's voluntary resignation).

The broader the universe gets, the more likely a court may find the restriction unreasonable (for example, if it covers all former and current employees of the disclosing party with a title of vice president or higher, instead of limiting it to the sub-group of these individuals of whom the recipient became aware or with whom it had contact during the evaluation or negotiation process). However, there have been instances where Georgia courts

applying the common law have found no-hire provisions without geographical restrictions or limitations on the scope of the employees encompassed by the no-hire to be enforceable (see, for example, *Celtic Maint. Servs., Inc. v. Garrett Aviation Servs., LLC*, 2007 WL 4557775, at *5 n.8 and n.10 (S.D. Ga. Dec. 21, 2007)).

In these situations, besides including a provision for involuntary termination, the disclosing party should consider adding an exception for former employees who left their employment voluntarily more than some specified period (for example, six months) before the solicitation or hiring occurred (see Exceptions to the Restricted Activity).

Sometimes, it may also be appropriate for the disclosing party to treat certain independent contractors as covered employees for the purposes of this restriction if the contracts with the applicable independent contractors support this type of restriction.

Recipient

The recipient tries to limit the universe of covered employees to as few employees as possible, often to key senior executives with whom the recipient had more than incidental contact or of whom it became aware during the evaluation process. In many instances, this formulation should be sufficient to protect the disclosing party's legitimate business concerns. In particular, the recipient does not want to allow the disclosing party to protect employees that the recipient:

- Does not know.
- Knew of and interacted with before any discussions regarding the potential transaction or receipt of the confidential information.

Other concerns exist if the parties operate in a specialized industry, particularly if there are few qualified professionals in the relevant pool of potential employees.

The recipient should also consider the likelihood that covered employees may be bound by exclusive employment agreements. If the parties operate

in an industry that historically enters into employment contracts with senior executives (and sometimes also mid-level executives), a disclosing party is likely protected by the contracts during the term of employment. The recipient should consider adding an exception permitting solicitation and hiring of covered employees after their contracts expire.

If the recipient cannot exclude former employees, it should try to negotiate an exclusion for solicitation and hiring of those covered employees that voluntarily terminated their employment with the disclosing party before the solicitation or hiring occurred (see Exceptions to the Restricted Activity).

DEFINING THE RESTRICTED ACTIVITY

Employee non-solicitation clauses typically prohibit the restricted persons from taking one or more of the following actions:

- Soliciting any covered employee for employment.
- Indicating any interest in entering into an employment or services arrangement with a covered employee.
- Encouraging any covered employee to terminate employment.
- Hiring any covered employee.
- Engaging any covered employee as an independent contractor or consultant.
- Entering into any form of services contract with a covered employee.

Many employee non-solicitation provisions are limited to restricting solicitation or encouragement, but do not include an outright prohibition against hiring (often referred to as a no-hire). Other provisions also include a no-hire obligation. A no-hire is more protective than a true non-solicitation and may be easier to prove from an evidentiary perspective.

However, because a no-hire provision has greater anticompetitive impact, similar to a non-compete, Georgia courts may be less willing to enforce a non-solicitation provision that contains a no-hire. For example, in *Club Props., Inc. v. Atlanta Offices-Perimeter, Inc.*, the court stated that as a partial restraint of trade, a no-hire provision in a lease must meet the “rule of reason” as to each of:

- Time.
- Territory.
- Proscribed activities.

(180 Ga. App. 352, 354 (1986).)

The court in *Club Properties* ultimately held that the covenant was unenforceable since it lacked a time limit (180 Ga. App. at 354).

Therefore, the more stringent the restriction in the covenant, the more scrutiny it will receive as a general proposition. If a party challenges a no-hire clause, the disclosing party should be prepared to articulate how the clause, as drafted:

- Has a narrow impact.
- Is reasonably calculated to protect a legitimate interest.

This is especially true because of the burdens the disclosing party would face when trying to prove breach of a non-solicitation without a no-hire if discussions between the recipient and the covered employee only occurred orally.

To support enforceability, the disclosing party should also consider including one or more commonly accepted exceptions for certain types of activities that recipients typically request.

Exceptions to the Restricted Activity

There are several standard exceptions to the restricted activity in an employee non-solicitation provision.

General Solicitations Using the Media

This commonly used exception excludes solicitations made using ads in the media. It is usually limited to solicitation not directed to employees of the disclosing party. In some instances the parties specify the categories of media that are acceptable. If general solicitations using social media are permitted, the parties should also consider specifying whether this exception applies to posts made to closed groups on social media networks such as Facebook friends, LinkedIn connections, and other closed user groups. These solicitations are not truly general in nature as they are targeted to a limited universe of recipients.

While the law is not yet fully developed in this area, and Georgia courts have not addressed general solicitations using the media, other courts outside the state have. Those courts have indicated that social media posts may or may not constitute prohibited solicitations depending on factors like:

- The nature of the posts (see, for example, *Joseph v. O'Laughlin*, 2017 WL 3641351, at *6-7 (Pa. Super. Aug. 22, 2017) (finding breach of non-solicitation clause where defendant created Facebook page to highlight a competitive venture and interacted with posters on the page)).
- The apparent audience for them (see, for example, *BTS, USA, Inc. v. Executive Perspectives, LLC*, 2014 WL 6804545, at *12 (Ct. Sup. Ct. 2014) (finding no solicitation where an employee posted his new job on LinkedIn and the site auto-generated a notification inviting his contacts to check out the new job on his profile) and *Arthur J. Gallagher & Co. v. Anthony*, 2016 WL 4523104 (N.D. Oh. 2016) (finding no violation of a non-solicitation agreement when a new employer posted a press release on LinkedIn and Twitter)).
- The extent of the direct interactions between the restricted party and the protected individuals in the audience (see, for example, *Pure Power Boot Camp Inc. v. Warrior Fitness Boot Camp LLC*, 813 F. Supp. 2d 489, 513 (S.D.N.Y. 2011) (declining to interpret a non-solicitation provision and customer restrictions as prohibiting former employees from becoming Facebook friends with their former employers' clients)).

Because the law is not yet clear, parties should negotiate this point and expressly address it in the provision to clarify the parties' intent, for example, by restricting media solicitations directed specifically toward company employees. For more information on general solicitations using the media, see Practice Note, Social Media and Restrictive Covenant Litigation ([2-599-2107](#)) and Social Media Usage Toolkit ([0-501-1201](#)).

Solicitations Using a Third-Party Recruiter or Search Firm

Similar to the exception for general solicitations using the media, this

exception permits the solicitation of a covered employee in a general recruitment process handled by a recruiter or search firm engaged by the recipient. While this exception may allow for solicitation by an outside recruiter, it may still prohibit the recruiter from specifically targeting the employees of the disclosing party.

Soliciting Former Employees

This exception usually permits the restricted person to solicit covered employees that have been terminated by the disclosing party, but not those employees who voluntarily leave their employment. Even though the recipient may not have actually prompted an employee's voluntary departure, disclosing parties argue that this is a reasonable restriction because of the difficulty in proving non-compliance with little or no tangible evidence if none of the discussions were made in writing.

In some situations, solicitation and hiring of former employees that left voluntarily is permitted after a specified period following termination of employment. The stated period should be sufficiently long to ensure that it protects the employer against voluntary departures for the specific purpose of going to work for the recipient. However, there is no set standard as to how long the specified time period should be. For example, in *Wetherington v. Ameripath, Inc.*, the court invalidated a non-recruitment clause that barred a former employee from hiring employees of his former employer who had no confidential information and who had resigned voluntarily as much as a year prior (2014 WL 2016582, at *1 (11th Cir. 2014)).

Employee-Initiated Approaches

This exception carves out solicitations initiated by the employee without any previous solicitation from the recipient. This Standard Clause does not include this exception because, similar to former employees that voluntarily left their employment, it poses an undue evidentiary burden on the disclosing party to prove that the initial indication of interest did not come from the recipient if it was communicated orally and not in writing. Also, relationships between employees on opposing sides of

a deal often develop organically when the parties are evaluating or negotiating the potential transaction. It is not unreasonable for the disclosing party to include protection against employee defections that only occurred because of this process.

Disclosing Party

The disclosing party aims to balance the desire to best protect its business interests against creating a provision that a court may deem overly broad and unreasonable. Therefore, the disclosing party should carefully consider the practical implications of each exception and narrowly tailor the description of restricted activities to those that are reasonable and necessary. This may support including a no-hire, especially if appropriate exceptions are also included.

When negotiating exceptions, the disclosing party should:

- Insist on limiting the exception for former employees to those covered employees whose employment has been terminated by the company or those who do not have any confidential information of the employer.
- Consider carving out solicitations directed to closed social media groups from the general solicitations exception.
- Include non-circumvention and non-concealment language to qualify the exceptions for general solicitations.
- Include a prohibition against using confidential information to conduct any excepted activity.
- If agreeing to allow solicitation or hiring of employees that voluntarily terminate their employment, require a substantial waiting

period (for example, six months) before permitting the recipient to solicit or hire the former employee.

Recipient

The recipient should try to limit its obligations to those of non-solicitation and not include a no-hire. If unsuccessful, it should try to:

- Restrict the scope of the overall no-hire restriction to the employment of any covered employees and not include engagement of covered employees as consultants or other types of independent contractors.
- Include multiple exceptions.

When negotiating exceptions, the recipient should try to:

- Include an exception for approaches made by covered employees.
- Broadly define permitted general solicitations to allow those made to closed social media groups.
- Include an exception for covered employees solicited or hired using a search firm.
- If the provision covers former employees, add an exception for covered employees that voluntarily terminated their employment with the disclosing party before the commencement of any solicitation by the recipient (with the understanding that the disclosing party may insist on a waiting period).
- Permit solicitation and hiring of covered employees under contract to the disclosing party after the term of the employment contract has expired.

(b) [induce, influence, or encourage, any client, customer, supplier, or other similar third party of [the other Party/the Disclosing Party/[DEFINED TERM FOR PARTY 1]] [or any of its [Affiliates/subsidiaries]] [that became known to the Restricted Person directly or indirectly pursuant to any Confidential Information or any discussions or communications relating to the evaluation or negotiation of the [Transaction/Proposed Transaction/Purpose]] (each, a "**Customer or Supplier**") to alter, terminate, or breach its contractual or other business relationship with [the other Party/the Disclosing Party/[DEFINED TERM FOR PARTY 1]] [or any of its [Affiliates/subsidiaries] [or, solicit business from any Customer or Supplier]]. [Notwithstanding the foregoing, nothing in this Section 1(b) restricts any Restricted Person from soliciting business from or engaging in business with any Customer or Supplier in the normal course of business, so long as the Restricted Person does not use any Confidential Information to identify such Customer or Supplier or to communicate or negotiate with such Customer or Supplier.]]

DRAFTING NOTE: NON-SOLICITATION OF CUSTOMERS AND SUPPLIERS

Section 1(b) is an optional customer and supplier non-solicitation provision that parties can use under appropriate circumstances. Similar to an employee non-solicitation clause, besides establishing duration and specifying the universe of restricted persons (see Drafting Notes, Term of the Non-Solicitation Obligation and Defining the Restricted Persons), the key terms of a customer and supplier non-solicitation include:

- The universe of protected suppliers, customers, and other types of clients.
- The definition of the restricted activity.

Georgia courts have historically regarded solicitation of suppliers, customers, and other types of clients as competitive activities (see, for example, *W.R. Grace & Co. v. Mouyal*, 262 Ga. 464 (1992)). Therefore, courts have more heavily scrutinized these provisions than employee non-solicitations and are more likely to hold them unenforceable (see, for example, *Sunstates Refrigerated Servs., Inc. v. Griffin*, 215 Ga. App. 61, 63 (1994)).

For those agreements encompassed by the restrictive covenant statute (including commercial contracts between two employers), customer non-solicitations that apply during the term of the parties' relationship are generally permitted (O.C.G.A. § 13-8-56(4)). While the statute specifically permits employers to have non-solicitation covenants with employees after the employee's employment ends, it does not specifically address whether post-termination non-solicitations are allowed in other contexts (O.C.G.A. § 13-8-53(b)).

Many confidentiality agreements include employee non-solicitations. Customer and supplier non-solicitations are less frequently included. They are used primarily when:

- The confidentiality agreement is between two competitors.
- The confidential information is expected to include non-public information regarding:
 - the disclosing party's customers and suppliers (for example, customer lists); or

- other information that the recipient can use to offer the same customers and suppliers more favorable terms.

Section 1(b) assumes that the appropriate term to describe these parties is "customer or supplier." If circumstances warrant a different formulation (for example, omitting suppliers or referencing clients instead of customers), the parties should revise this language accordingly.

DEFINING THE PROTECTED CUSTOMERS AND SUPPLIERS

The universe of protected customers and suppliers often covers one of the following:

- All current customers and suppliers of the disclosing party (and sometimes those of its subsidiaries or affiliates).
- All current and prospective customers and suppliers of the disclosing party (and sometimes those of its subsidiaries or affiliates).
- The current (or current and prospective) customers and suppliers of the disclosing party (and sometimes those of its subsidiaries or affiliates) that the recipient became aware of (even on a no-name basis):
 - because of the confidential information; or
 - otherwise during the evaluation or negotiation of the potential transaction.

To support enforceability, this Standard Clause uses a limited formulation that covers existing customers and suppliers of the disclosing party (and, if appropriate, those of its subsidiaries or affiliates), but not prospective ones. The optional bracketed language further limits this definition to those customers and suppliers that the restricted person became aware of:

- From confidential information.
- Otherwise during the evaluation or negotiation of the potential transaction.

Even if the parties use a broader formulation to define protected customers and suppliers, the exception for business in the ordinary course (see Exceptions Permitting Solicitation) significantly lessens the

potential anticompetitive effect of this restriction.

Disclosing Party

The disclosing party should consider:

- Whether a customer and supplier non-solicitation is necessary to protect the disclosing party's legitimate business interests. Factors to consider include:
 - the number and relative size and quality of the customers and suppliers in the relevant industry and geographical territory;
 - the likelihood that the disclosing party and the recipient actually compete for the same customers and suppliers;
 - the likelihood that the confidential information will include information that the recipient can use to divert business away from the disclosing party's current and prospective customers; and
 - whether key customer and supplier relationships are exclusive or non-exclusive (and whether they are protected by contract).
- How to craft the non-solicitation to ensure that it is reasonable in scope.
- Whether to include both customers and suppliers or limit the scope of protected persons to only one of these categories.
- Whether to list some or all protected customers or suppliers by name.

Recipient

If the recipient is unsuccessful in completely excluding the customer or supplier non-solicitation, the recipient should try to negotiate a narrow formulation of covered customers and suppliers. If appropriate for the relevant business or industry, the recipient should try to restrict the provision to customers and suppliers that are in exclusive arrangements with the disclosing party (or, if applicable, its subsidiaries or affiliates).

DEFINING THE RESTRICTED ACTIVITY

Customer and supplier non-solicitation clauses typically prohibit the restricted persons from taking one or more of the following actions:

- Soliciting business from any protected customer or supplier.
- Entering into a contract with any protected customer or supplier.
- Encouraging or otherwise inducing any protected customer or supplier to divert business from or terminate its business relationship with the disclosing party (and sometimes its subsidiaries or affiliates).
- Otherwise altering or interfering with the relationship between the disclosing party (and sometimes its subsidiaries or affiliates) and its protected customers and suppliers (and sometimes those of its subsidiaries or affiliates).
- If prospective customers and suppliers are protected, encouraging or otherwise inducing any protected prospective customer or supplier to refrain from entering into a contractual or other business relationship with the disclosing party (and sometimes its subsidiaries or its affiliates).

A provision that includes a blanket non-solicitation obligation, which prohibits the recipient from soliciting any business from protected customers and suppliers, is more restrictive and more likely to be treated by Georgia courts as a true non-compete (O.C.G.A. § 13-8-53(b)). Section 13-8-53(b) requires a restriction on solicitation to be limited to products or services that are competitive with the employer's products or services. Therefore, parties often include certain standard exceptions to limit the anticompetitive effect of these provisions.

Exceptions Permitting Solicitation

Customer and supplier non-solicitation clauses often include exceptions permitting solicitation of protected customers and suppliers:

- In the normal course of business.
- That are in existing relationships with the recipient or its affiliates.
- That were in a contractual relationship with the disclosing party that has expired (even if the parties continue to do business with one another).

Disclosing Party

The disclosing party must balance the desire to protect its customer and supplier

relationships against creating an overbroad and unenforceable provision. If the clause contains a blanket non-solicitation obligation, the disclosing party should consider including the bracketed final sentence that permits solicitations made in the normal course of business but restricts the recipient from using any confidential information when:

- Identifying customers and suppliers.
- Communicating or conducting negotiations.

Recipient

The recipient should try to limit the scope of restricted activities to:

- Interfering with exclusive relationships.
- Using confidential information to communicate or negotiate with customers and suppliers.

If the disclosing party insists on a standard provision, especially one with a blanket non-solicitation obligation, the recipient should insist on including exceptions permitting:

- Solicitation of the recipient's and its affiliates' existing customers and suppliers.
- Conducting business in the ordinary course with existing and prospective customers and suppliers.

[[Recipient/[DEFINED TERM FOR PARTY 2]/the Parties] agree[s] that the duration, scope, and geographical area of the restrictions contained in this Section 1 are reasonable. Upon a determination that any term or provision of this Section 1 is invalid, illegal, or unenforceable, the court may modify this Section 1 to substitute the maximum duration, scope, or geographical area legally permissible under such circumstances to the greatest extent possible to effect the restrictions originally contemplated by the Parties hereto.]

DRAFTING NOTE: ACKNOWLEDGMENT OF REASONABLENESS; BLUE-PENCILING

The final optional paragraph of this Standard Clause includes:

- An acknowledgment by the recipient that the restrictions contained in the non-solicitation provision are reasonable.
- The parties' agreement to permit the court to modify (blue pencil) these restrictions if they are held to be overly restrictive. Sections 13-8-53(d) and 13-8-54(b) of the restrictive covenant statute authorize courts to modify over broad restrictions (O.C.G.A. §§ 13-8-53(d) and 13-8-54(b)). The question of blue-penciling versus judicial modification under the restrictive covenant statute is the subject of much debate and has not yet been addressed by the appellate courts. However, at least one federal court in Georgia has held that courts are only permitted to blue-pencil restrictive covenants and not otherwise rewrite the agreement by supplying new and material terms that the parties have not agreed to

(see *LifeBrite Labs., LLC v. Cooksey*, 2016 WL 7840217, at *7 (N.D. Ga. Dec. 9, 2016)). Therefore, parties should draft operative provisions in a way that allows a court to:

- easily strike unenforceable language; and
- where applicable, narrow overly broad provisions.

Many non-solicitations used in business-to-business confidentiality agreements do not include this language. However, the disclosing party should consider including this paragraph if the non-solicitation clause includes provisions that are more restrictive (which poses greater enforceability concerns), including, for example:

- A restrictive employee non-solicitation obligation that contains a no-hire (particularly in an industry where there are a limited number of qualified professionals or individuals with a particular skill set).

- A customer and supplier non-solicitation obligation (especially if it contains a blanket non-solicitation obligation without standard exceptions).

For more information on blue-penciling, see Standard Clauses, General Contract

Clauses: Severability (GA): Drafting Note: Reform of Contract Terms ([W-000-0973](#)) and Practice Note, Contracts: Equitable Remedies: Reformation ([0-519-3197](#)).

ABOUT PRACTICAL LAW

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at legalsolutions.com/practical-law. For more information or to schedule training, call **1-800-733-2889** or e-mail referenceattorneys@tr.com.

Confidentiality and Nondisclosure Agreements (GA)

**BENJAMIN I. FINK AND NEAL F. WEINRICH, BERMAN FINK VAN HORN P.C.,
WITH PRACTICAL LAW COMMERCIAL TRANSACTIONS**

Law stated as at 28 Feb 2018

Search the [Resource ID numbers in blue](#) on Westlaw for more.

This Practice Note discusses overall protection of a company's confidential information and the use of confidentiality agreements (also known as nondisclosure agreements or NDAs) in the context of commercial transactions under Georgia law. It provides practical tips on developing internal systems and contract provisions designed to protect a company's sensitive information, including its business assets and relationships, data security, and trade secrets.

Nearly all businesses have valuable confidential information and, for many, confidential information is a dominant asset. Protection of confidential information within an organization is usually a vital business priority.

Companies also share, receive, and exchange confidential information with and from customers, suppliers, and other parties in the ordinary course of business and in a wide variety of commercial transactions and relationships. These transactions and relationships include when companies enter into:

- Consulting engagements.
- Service agreements.
- Strategic alliances.
- Supply contracts.
- Distribution agreements.

Contractual confidentiality obligations are fundamental and necessary to help protect the parties that disclose information in these situations. Depending on the circumstances, these obligations can be documented in either:

- A free-standing confidentiality agreement (also known as a nondisclosure agreement or NDA) (see Standard Document, Confidentiality Agreement: General (Short Form, Mutual) (GA) ([W-008-9296](#))).

- Clauses within an agreement that covers a larger transaction (see Standard Clauses, General Contract Clauses: Confidentiality (Short Form) (GA) ([W-000-0956](#)) and General Contract Clauses: Confidentiality (Long Form) (GA) ([W-000-0955](#))).

This Note describes:

- Considerations involved in safeguarding a company's confidential information and some common approaches and leading practices when using confidentiality agreements.
- Various forms of general confidentiality agreements and factors to consider in structuring specific agreements.
- Substantive provisions that are common to many commercial confidentiality agreements and issues that may be encountered when drafting, reviewing, and negotiating each clause.
- Special considerations under Georgia and federal law.

The practical considerations explained in this Note are also covered in checklist form in the Confidentiality and Nondisclosure Agreements Checklist ([6-501-7380](#)).

Specialized types of confidentiality agreements are used in connection with mergers and acquisitions (see Practice Note, Confidentiality Agreements: Mergers and Acquisitions ([4-381-0514](#))) and certain finance transactions (see Practice Note, Confidentiality Agreements: Lending ([1-383-5931](#))).

OVERALL PROTECTION OF CONFIDENTIAL INFORMATION PROTECTING CONFIDENTIAL INFORMATION AS VALUABLE BUSINESS ASSETS

Most companies derive substantial value from their confidential information and data, both by having exclusive use of it in their own businesses and by sharing it selectively with customers, suppliers, and others. Confidential information can be used and shared more effectively and securely, to the greater benefit of the business, if the company routinely:

- Takes stock and identifies the information it considers to be confidential.
- Assesses the value of its information assets.
- Maintains rigorous internal policies and practices to keep it confidential.

Confidential information takes various forms in different businesses and industries (see Definition of Confidential Information Under Georgia Law and Definition of Confidential Information in the Agreement), and often includes information entrusted to a company by its customers, suppliers, and other parties, subject to contractual use restrictions and nondisclosure obligations. Courts make a distinction between confidential information and trade secrets (see Trade Secrets). While a trade secret has to meet the statutory definition for a court to protect it, confidential information can generally mean whatever the parties to an agreement define it to be, which may or may not include trade secrets, as long as the party seeking protection has a “legitimate need” to protect the information.

DEFINITION OF CONFIDENTIAL INFORMATION UNDER GEORGIA LAW

In 2011, the Georgia legislature enacted a restrictive covenant statute (O.C.G.A. § 13-8-50 et seq.). Under this statute, for most agreements entered into after May 11, 2011, confidential information is defined as data and information that:

- Relates to the business of the disclosing party, regardless of whether the data or information constitutes a trade secret, as that term is defined in O.C.G.A. § 10-1-761.
- Is disclosed to the receiving party or which the receiving party became aware of as a consequence of the receiving party’s relationship with the disclosing party.
- Has value to the disclosing party.
- Is not generally known to the competitors of the disclosing party.
- Includes:
 - trade secrets;
 - methods of operation;
 - names of customers;
 - price lists;
 - financial information and projections;
 - route books;
 - personnel data; and
 - similar information.

(O.C.G.A. § 13-8-51(3).)

Confidential information does **not** include any data or information that has:

- Been voluntarily disclosed to the public by the disclosing party, except where such public disclosure has been made by the receiving party without authorization from the disclosing party.
- Been independently developed and disclosed by others.
- Otherwise entered the public domain through lawful means.

(O.C.G.A. § 13-8-51(3).)

Note that Section 13-8-51(3) specifically defines confidential information in terms of an employment relationship, referring to “employer” and “employee” as opposed to “disclosing party” and “receiving party.” The term “employer” is defined broadly to include most business entities that conduct business with one another, making this definition applicable to many types of commercial contracts (O.C.G.A. §§ 13-8-51(6) and 13-8-52).

Georgia’s restrictive covenant statute (O.C.G.A. § 13-8-50 et seq.) **does not** apply to contracts entered into prior to May 11, 2011. The restrictive covenant statute also may not apply to every commercial contract. It is only applicable to contracts and agreements between or among:

- Employers and employees (as such terms are defined in O.C.G.A. § 13-8-51).
- Distributors and manufacturers.
- Lessors and lessees.
- Partnerships and partners.
- Franchisors and franchisees.
- Sellers and purchasers of a business or commercial enterprise.
- Two or more employers.

(O.C.G.A. § 13-8-52(a).)

Section 13-8-52(b) specifically states that the provisions of the restrictive covenant statute **do not** apply to any contract or agreement **not** described in Section 13-8-52(a) (O.C.G.A. § 13-8-52(b)). Therefore, the statutory definition of confidential information may not apply, for example, to a software licensing agreement, a sales agreement, or an agreement to provide services to a customer. However, if both parties to these types of agreements happen to be employers, it could be argued that the agreement is between two or more employers and that the statutory definition of confidential information would be applicable.

In agreements not covered by the restrictive covenant statute, the common law must be consulted for the definition of “confidential information.” Unfortunately, the definition of confidential information is not well-developed under Georgia’s common law. Generally, the cases state that confidential information is information which a business has a “legitimate need” to protect (see, for example, *Durham v. Stand-by Labor of Ga., Inc.*, 230 Ga. 558, 564-65 (1973)). Whether a business has a legitimate need to protect particular information is a factual question (see *Durham*, 230 Ga. at 565, see also *TDS Healthcare Sys. Corp. v. Humana Hosp. Ill., Inc.*, 880 F. Supp. 1572, 1585 (N.D. Ga. 1995)). Courts have stated that for information to be considered confidential:

- The information must be the plaintiff’s property.
- The information must be peculiar to the plaintiff’s business.
- The disclosure or use of the information by the defendant causes injury to the plaintiff.
- The information must possess an element of secrecy peculiar to the complaining party, known only to it, not general secrets of the trade.

(See *TDS Healthcare*, 880 F. Supp. at 1585.)

For commercial contracts that do not fall within the types of agreements listed in Section 13-8-52(a), confidential information should be defined in the agreement by the parties. When drafting the agreement, parties should keep in mind that:

- A time limit on the nondisclosure or confidentiality provision is required for the agreement to be enforceable as to information not constituting a trade secret.
- A definition of “confidential information” that covers information that is not actually confidential could be struck down by a court as unenforceable.

(See *Nasco v. Gimbert*, 239 Ga. 675, 676-77 (1977) and *Carson v. Obor Holdings Co.*, 318 Ga. App. 645, 649-50 (2012).)

That said, Georgia courts have found a wide variety of information to qualify as confidential information (and in certain instance, rising to the level of trade secrets), including:

- Company systems and methods, pricing policies, technical bulletins, manuals, profit and loss information, training and education received by an employee (*Nunn v. Orkin Exterminating Co., Inc.*, 256 Ga. 558, 559-60 (1986)).
- Customer lists with names, addresses, and personnel data (*Durham*, 230 Ga. at 564).
- Methods, processes, apparatus, programs, or other materials conceived, designed, created, used, or developed by company, as well as customers, customer lists, pricing, pricing methods, agents, suppliers, contractors, and trade secrets (*U3 S Corp. of America v. Parker*, 202 Ga. App. 374, 376 (1991)).

The main distinction between “trade secrets” and “confidential information” is that Georgia law generally does not provide protection for confidential information unless there is an enforceable contract prohibiting its use or disclosure (see, for example, *Durham*, 230 Ga. at 562-63).

COMPANY-WIDE INFORMATION AND DATA SECURITY POLICIES, SYSTEMS, AND PROCEDURES

Having effective confidentiality agreements in place with other parties is necessary but not sufficient to protect an organization’s confidential information and data. Comprehensive protection requires the participation and coordination of management and staff at all levels across all functions, from finance and administration to marketing and sales. It often falls to the legal department, working closely with the information technology (IT) function and with the support of senior executives, to lead the company-wide information management and protection program.

Effective information and data security depends on developing comprehensive policies and procedures, and applying them consistently. It is especially important to have in place:

- A uniform confidentiality and proprietary rights agreement that must be signed by all employees as a condition of employment (see Standard Document, Employee Confidentiality and Proprietary Rights Agreement (GA) (0-588-3166)). In Georgia, requiring all employees to sign confidentiality agreements may be sufficient to constitute a reasonable step to maintain the secrecy of information, but the agreement alone is insufficient to protect confidential information when the employer fails to take reasonable steps to enforce it (see, for example, *Equifax Servs., Inc. v. Examination Mgmt. Servs., Inc.*, 216 Ga. App. 35, 39-40 (1994); see also *AmeriGas Propane, L.P. v. T-Bo Propane, Inc.*, 972 F. Supp. 685, 700-01 (S.D. Ga. 1997)).
- An IT and communications systems policy that governs employees’ appropriate use of these company resources, in the interest of protecting confidential information (see Standard Document, IT and Communications Systems Policy (8-500-5003)). The Georgia Computer Systems Protection Act (GCSPA) was enacted in response to the growing problem of

computer related crimes in the government and the private sector (O.C.G.A. § 16-9-90 et seq.). The GCSPA provides for liability and prosecution of persons engaged in computer related crimes that have an effect on state commerce and has been applied in the employer-employee context (see, for example, *DuCom v. State*, 288 Ga. App. 555 (2007)). Policies governing the use of company computers and IT systems are critical to seeking criminal or civil relief under the GCSPA.

Robust physical and electronic security measures must be implemented and regularly tested, audited, and updated as part of the larger effort to protect the company’s information assets. The company should have:

- Systems and processes in place to monitor and detect unauthorized disclosures of confidential information.
- Contingency plans and procedures to address any leaks that are detected.

These procedures should include notification of other parties whose information may have been disclosed in violation of applicable confidentiality agreements and mandatory notification of individuals whose personal information is compromised (see Practice Note, Breach Notification (3-501-1474)).

Georgia has a general data breach notification statute (O.C.G.A. §§ 10-1-911 to 912). It applies to any data collector or information broker that maintains or licenses computerized data that includes personal information of a Georgia resident (O.C.G.A. § 10-1-912).

- A data collector is any state or local agency or subdivision. It does not include any governmental agency that maintains records primarily for traffic safety, law enforcement, or licensing purposes or to provide public access to court records or to real or personal property information.
- An information broker is any person or entity that for monetary fees:
 - engages in the business of collecting, assembling, evaluating, compiling, reporting, transmitting, transferring, or communicating information about individuals;
 - for the primary purpose of providing personal information to unaffiliated third parties.
- The statute also imposes certain obligations on any person or business that maintains computerized data that includes personal information on behalf of an information collector or data broker.

(O.C.G.A. §§ 10-1-911 to 912; see also State Q&A, Data Breach Notification Laws: Georgia (5-578-1085)).

COMPLIANCE WITH CONTRACTUAL OBLIGATIONS GOVERNING OTHERS’ CONFIDENTIAL INFORMATION

In addition to safeguarding their own confidential information, companies are responsible for protecting information that is disclosed to them by customers, suppliers, and others, as a matter of compliance with relevant confidentiality agreements or analogous provisions within larger commercial agreements.

The principal obligations (covenants) typically imposed on recipients of confidential information include:

- Nondisclosure obligations, including restrictions against further disclosure of the information to third parties (for example, to subcontractors).
- Restrictions on access to and use of the information within the recipient's business and among its employees.
- Physical and electronic security requirements, which may be more stringent than the recipient's policies and procedures applicable to its own confidential information.
- Obligations to return or destroy original materials containing confidential information, and any printed or electronic copies made by the recipient, on expiration or termination of the applicable confidentiality agreement or provisions.

For more information on the principal obligations typically imposed on the recipients of confidential information, see Key Provisions and Issues.

TRADE SECRETS

Certain confidential business, financial, and technical information may be subject to protection as trade secrets under Georgia law. This is in addition to and independent of any contractual protections afforded by confidentiality agreements or provisions. For example, any of the following types of information may be considered trade secrets if certain criteria are met:

- Client lists (see *Avnet, Inc. v. Wyle Labs., Inc.*, 263 Ga. 615 (1993); see also *Paramount Tax & Accounting, LLC v. H&R Block E. Enters., Inc.*, 299 Ga. App. 596, 603-04 (2009)).
- Marketing plans (see *Camp Creek Hosp. Inns, Inc. v. Sheraton Franchise Corp.*, 139 F.3d 1396, 1410-11 (11th Cir. 1998)).
- Financial data and financial plans (see *Camp Creek Hosp. Inns, Inc.*, 139 F.3d at 1410-11).
- Business methods (see *Amedisys Holding, LLC v. Interim Healthcare of Atlanta, Inc.*, 793 F. Supp. 2d 1302, 1310 (N.D. Ga. 2011)).
- Production processes (see *Salsbury Labs., Inc. v. Merieux Labs., Inc.*, 908 F.2d 706, 710-12 (11th Cir. 1990); *Candy Craft Creations, LLC v. Gartner*, 2015 WL 1541507, at *22 (S.D. Ga. Mar. 31, 2015); and *Union Carbide Corp. v. Tarancon Corp.*, 742 F. Supp. 1565, 1578-79 (N.D. Ga. 1990)).
- Recipes and chemical formulas (see *Thomas v. Best Mfg. Corp., Div. of Tillotson Corp.*, 234 Ga. 787, 790 (1975); see also *Douglas Asphalt Co. v. E.R. Snell Contractor, Inc.*, 282 Ga. App. 546, 549-50 (2006)).
- Software algorithms and source code (see *Coleman v. Retina Consultants, P.C.*, 286 Ga. 317 (2009); *Phillips v. State*, 324 Ga. App. 728 (2013); *Priority Payment Sys., LLC v. Signapay, LTD*, 161 F. Supp. 3d 1294, 1299-01 (N.D. Ga. 2016); and *CMAX/Cleveland Inc. v. UCR, Inc.*, 804 F. Supp. 337, 357 (M.D. Ga. 1992)).
- Logistics systems and schematics (see *Essex Group, Inc. v. Southwire Co.*, 269 Ga. 553, 555 (1998)).

The following are some examples where Georgia courts have **not** found a protectable trade secret:

- Certain price proposals (see, for example, *State Rd. & Tollway Auth. v. Elec. Transactions Consultants Corp.*, 306 Ga. App. 487, 489 (2010)).

- Lists of investors and their addresses where general partners of public limited partnerships admitted there was no economic value in maintaining the secrecy of the lists (*Sutter Capital Mgmt, LLC v. Wells Capital, Inc.*, 310 Ga. App. 831, 833 (2011)).
- Certain types of brochures and related material (see, for example, *Wachovia Ins. Svcs. v. Fallon*, 299 Ga. App. 440, 445-47 (2009)).

(See also State Q&A, Trade Secret Laws: Georgia ([1-506-1182](#))).

Georgia Trade Secrets Act

Additionally, Georgia, like nearly every state, offers some trade secret protection under its adopted version of the Uniform Trade Secrets Act (UTSA). Georgia has adopted a modified version of the UTSA, the Georgia Trade Secrets Act (GTSA) (O.C.G.A. §§ 10-1-760 to 10-1-767; see also State Q&A, Trade Secret Laws: Georgia ([1-506-1182](#))).

The GTSA defines "trade secret" as information, without regard to form that:

- Includes, but is not limited to:
 - technical or nontechnical data;
 - a formula;
 - a pattern;
 - a compilation;
 - a program;
 - a device;
 - a method;
 - a technique;
 - a drawing;
 - a process;
 - financial data;
 - financial plans;
 - product plans; or
 - a list of actual or potential customers or suppliers which is not commonly known by or available to the public.
- Derives economic value, actual or potential, from not being:
 - generally known to other persons who can obtain economic value from its disclosure or use; and
 - readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use.
- Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(O.C.G.A. § 10-1-761(4).)

Although the GTSA does not require absolute secrecy for trade secret status, the Georgia Supreme Court has ruled that a party must make reasonable efforts under the circumstances to maintain the confidentiality of the information (*Smith v. Mid-State Nurses, Inc.*, 261 Ga. 208, 209-10 (1991); see also *Diamond Power Int'l, Inc. v. Davidson*, 540 F. Supp. 2d 1322, 1332-33 (N.D. Ga. 2007)).

Examples of precautionary measures to protect information as trade secrets that courts have found to be reasonable include:

- Not publishing the information outside of the business.
- Establishing company-wide policies to prevent the disclosure of information to third parties.
- Training employees to prevent the disclosure of information to third parties.
- Limiting the access of information to certain employees.
- Making the information password protected.

(*Paramount Tax & Accounting*, 299 Ga. App. at 603 (2009)).

Even if some or all of the components of a trade secret are publicly known, a party can obtain trade secret protection under the GTSA for secret combinations, compilations, or integrations of the components if a competitive advantage is gained (see *Essex Grp.*, 269 Ga. at 554).

A written agreement is necessary to protect confidential information if it does not otherwise rise the level of a trade secret. Section 13-8-51(3) does not explain the distinction between confidential information and trade secrets however, some distinctions can be discerned. For example, the statute does not appear to require any inquiry into whether a business has a legitimate need to protect information that meets the statute's definition of confidential information. Therefore, it appears that any information meeting the definition may be protected by a nondisclosure agreement without any additional showing of a legitimate need for protection.

Differences Between the GTSA and the UTSA

The GTSA differs from the UTSA in the following ways:

- **The definition of trade secret.** The definition of trade secret is expanded under the GTSA to include:
 - technical or nontechnical data;
 - a drawing;
 - financial data;
 - financial plans; and
 - product plans.
- (O.C.G.A. § 10-1-761(4)).
- Unlike the UTSA, the GTSA only protects information regarding customers and suppliers if that information is incorporated into a list or lists (O.C.G.A. § 10-1-761(4)).
- **The definition of improper means.** Reverse engineering of a trade secret not acquired by misappropriation or independent development is not considered improper means under the GTSA (O.C.G.A. § 10-1-761(1)).
- **Injunctive relief.** Both the GTSA and the UTSA permit injunctive relief even after information is no longer a trade secret to eliminate a commercial advantage derived by misappropriation. The GTSA, however, provides that an injunction may also be continued for a reasonable period of time where the trade secret ceases to exist because of improper means used by the enjoined party or others (O.C.G.A. § 10-1-762(a)).
- **Statute of limitations.** The GTSA imposes a five-year statute of limitations on the misappropriation of a trade secret, compared with the three-year statute of limitations imposed by the UTSA

(O.C.G.A. § 10-1-766 and UTSA § 6). The five-year period imposed by the GTSA begins to run from when the misappropriation either:

- is discovered; or
- should have been discovered by the exercise of reasonable diligence.

- (O.C.G.A. § 10-1-766; see also *Porex Corp. v. Haldopoulos*, 284 Ga. App. 510, 516 (2007).)
- Unlike the UTSA, the GTSA provides that the statute of limitations applies separately against each person who receives a trade secret from another person who misappropriated that trade secret (O.C.G.A. § 10-1-766).
- **Economic value.** While both the GTSA and the UTSA require that a trade secret have economic value, the UTSA requires that such value must be derived independently to constitute a trade secret.
- **Customer information.** The GTSA only covers information regarding actual or prospective customers to the extent the information is contained in a list, it does not protect intangible customer information (see *Avnet, Inc.*, 263 Ga. at 618-20). The UTSA does not include this requirement.

These deviations from the UTSA and the Georgia legislature's failure to adopt the provision that courts construe the statute to achieve uniformity amongst all states adopting the UTSA indicates that Georgia courts are not obligated to follow the decisions of other states.

Defend Trade Secrets Act

As of May 2016, businesses may also find trade secret protection under the federal Defend Trade Secrets Act (DTSA) (18 U.S.C.A. §§ 1831 to 1839). The DTSA provides a federal cause of action for an owner of a trade secret that is misappropriated if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce (18 U.S.C. § 1836(b)(1)).

Under the DTSA, trade secret is defined as all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if both:

- The owner has taken reasonable measures to keep such information secret.
- The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information. (18 U.S.C.A. § 1839(3).)

The DTSA does not preempt state trade secret laws, and injunctions under the DTSA may not conflict with state law prohibiting restraints on the practice of a lawful profession, trade, or business. For more information on trade secrets, see:

- Practice Notes:
 - Intellectual Property: Overview: Trade Secrets ([8-383-4565](#)); and
 - Protection of Employers' Trade Secrets and Confidential Information ([5-501-1473](#)).

- Standard Clause, General Contract Clauses, Confidentiality Agreement Clauses After the Defend Trade Secrets Act ([W-002-9194](#)).
- Defend Trade Secrets Act (DTSA) Issues and Remedies Checklist ([W-003-6953](#)).

PRIVACY AND DATA SECURITY LAWS AND REGULATIONS

Certain kinds of personal information commonly held by businesses, such as employee records and customers' financial accounts, may be subject to special protection requirements under various federal and state privacy and data security laws and regulations. These legal requirements are related to contractual nondisclosure obligations, but they apply whether or not the personal information is otherwise treated as confidential (see Practice Note, US Privacy and Data Security Law: Overview ([6-501-4555](#))). Data privacy laws and regimes usually extend protections to personal information of employees, customer, and clients.

Broadly, the term personal information (also known as "personally identifiable information" or "personal data"), refers to information that can be used to identify, locate, or contact an individual, alone or when combined with other personal or identifying information, including that person's:

- Name.
- Home or other physical address.
- Email address.
- Telephone number.
- Social security number.
- Passport number.
- Driver's license number.
- Bank account number.
- Credit or debit card number.
- Personal characteristics, including:
 - photographic image;
 - fingerprints;
 - handwriting; or
 - other unique biometric data.

For US federal and state privacy and data security laws, the precise definition of personal information varies depending on the specific jurisdiction and law, and may be more narrowly defined. For more information, see Practice Note, US Privacy and Data Security Law: Overview ([6-501-4555](#)).

"Sensitive personal information" is a subset of personal information that is more significantly related to the notion of a reasonable expectation of privacy, and may include an individual's health related information or financial information.

In general, businesses must implement internal policies and procedures to safeguard personal information. Encryption is one example of a method acceptable by privacy laws to protect such information, keeping in mind that sensitive personal information should be given enhanced protection. Employers in particular must also note that data privacy obligations are not only to protect active employees, but extend to protect any non-employee groups such

as clients and customers, job applicants, consultants, independent contractors, and terminated or retired employees.

There are many federal statutes to protect specific types of personal information which certain businesses are obligated to follow, including:

- The Health Insurance Portability and Accountability Act of 1996 (HIPAA) and its implementing regulations, which covers certain health related information (Pub. L. No. 104-191, 110 Stat. 1936 (1996); 45 C.F.R. § 160.101, § 162.100 and § 164.102).
- The Genetic Information Nondiscrimination Act, which applies specifically to genetic information (Pub. L. No. 110-233).
- The Fair and Accurate Credit Transactions Act designed to protect consumer credit information (15 U.S.C.A. § 1681).

Unlike many other states, Georgia has very little in the way of laws or regulations relating to privacy or data security. Other than Section 10-1-393.8 which addresses public disclosure and other requirements relating to social security numbers, Georgia does not currently have any special protection requirements with respect to privacy or data security (O.C.G.A. § 10-1-393.8).

FORM AND STRUCTURE OF CONFIDENTIALITY AGREEMENTS

RELEVANT TRANSACTIONS AND RELATIONSHIPS

A range of commercial transactions and relationships involve either the disclosure of confidential information by one party to the other or a reciprocal exchange of information. Although many confidentiality agreements have similar structures and share key provisions, there is great variation in the form, structure, and substantive details that should be tailored to the specific circumstances of each agreement. For example, confidentiality agreements may be used when:

- Evaluating or engaging a business or marketing consultant or agency, where the hiring company is necessarily disclosing confidential information to enable the consultant to perform the assignment.
- Soliciting proposals from vendors, software developers, or other service providers, which usually involves the exchange of pricing, strategies, personnel records, business methods, technical specifications, and other confidential information of both parties.
- Entering into a co-marketing relationship, as an e-commerce business, with the operator of a complementary website or a similar type of strategic alliance.
- Entering into a supply or distribution agreement where one party will supply product(s) to the other or the other's customers or one party will distribute the product(s) of the other.

WHY IS IT NECESSARY TO HAVE WRITTEN CONFIDENTIALITY AGREEMENTS?

Your business clients may not appreciate the importance of entering into written confidentiality agreements, preferring to rely on informal understandings and arrangements with parties to or from which confidential information is disclosed or received. However, there are numerous reasons to enter into written confidentiality agreements, such as:

- Avoiding confusion over what the parties consider to be confidential.
- Allowing more flexibility in defining what is confidential.

- Delineating expectations regarding treatment of confidential information between the parties, whether disclosing, receiving, or both disclosing and receiving confidential information.
- Enforcing written contracts is typically easier than oral agreements.
- Memorializing confidentiality agreements is often required under “upstream” agreements with third parties (for example, a service provider’s customer agreement may require written confidentiality agreements with subcontractors).
- Maximizing protection of trade secrets, because under state law this protection can be weakened or lost (deemed waived) if disclosed without a written agreement (see Trade Secrets).
- Protecting information that does not rise to the level of a trade secret under the GTSA.
- Covering issues that are indirectly related to confidentiality, such as non-solicitation (see General Provisions and Standard Clauses, Confidentiality Agreement: Non-Solicitation Clause (GA) ([W-008-9294](#))).
- Maintaining standards that are expected of most commercial transactions and relationships.

STRUCTURE AND TIMING

A free-standing confidentiality agreement is sometimes the sole contractual arrangement that defines the parties’ relationship. In other circumstances it may be used as a preliminary document, intended either to co-exist with an eventual comprehensive agreement governing the larger transaction or to be superseded by separate confidentiality provisions in that agreement. A separate confidentiality agreement is often used:

- Where the parties need to exchange confidential information to request or prepare proposals for a larger transaction.
- To conduct due diligence in the course of negotiating a definitive agreement.

Confidentiality provisions are sometimes incorporated in a term sheet for certain kinds of deals but, because these clauses may be relatively lengthy, it may be easier to have them in a separate agreement. If the parties decide to include confidentiality provisions in the term sheet, they should ensure that all of the confidentiality provisions are binding, even if the other provisions are not. If the parties negotiate a term sheet after the signing of a confidentiality agreement, it is a good idea to refer to the executed confidentiality agreement in the term sheet. Conversely, free-standing confidentiality agreements should reference any term sheets or definitive agreements that the parties contemplate, whether or not they supersede the confidentiality agreement. For more information on term sheets, see Practice Note, Term Sheets ([5-380-6823](#)).

The parties should sign a confidentiality agreement as early as possible in their relationship or at the outset of substantive negotiations in larger transactions, preferably before any confidential information is disclosed. If a party discloses information before signing the confidentiality agreement, the agreement should specifically cover prior disclosures.

MUTUAL, UNILATERAL, AND RECIPROCAL FORMS

Depending on the type of transaction or relationship, only one party may share its confidential information with the other, or the parties

may engage in a mutual or reciprocal exchange of information. There are distinct forms of confidentiality agreements to accommodate these different arrangements.

Unilateral Confidentiality Agreements

Unilateral confidentiality agreements contemplate that one of the parties intends to disclose confidential information to the other party, for example, where a consultant is to have access to the client’s business information in the course of an engagement. In unilateral confidentiality agreements, the nondisclosure obligations and access and use restrictions apply only to the party that is the recipient of confidential information but the operative provisions can be drafted to favor either party. For sample unilateral confidentiality agreements, see Standard Documents, Confidentiality Agreement:

- General (Unilateral, Pro-Discloser ([9-501-6497](#))).
- General (Unilateral, Pro-Recipient ([2-501-9258](#))).

Mutual Confidentiality Agreements

In mutual confidentiality agreements, each party is treated as both a discloser of its, and a recipient of the other party’s, confidential information (such as where two companies form a strategic marketing alliance). In these situations, both parties are subject to identical nondisclosure obligations and access and use restrictions for information disclosed by the other party. For a sample mutual confidentiality agreement, which can be used for general commercial relationships and transactions, see Standard Document, Confidentiality Agreement: General (Mutual) ([1-501-7108](#)). For a short form sample mutual confidentiality agreement, see Standard Document, Confidentiality Agreement: General (Short Form, Mutual) (GA) ([W-008-9296](#)).

Even in transactions and relationships where the confidential information to be exchanged is not of equivalent kind or value, the parties may still agree to use a mutual confidentiality agreement. When preparing or reviewing a mutual confidentiality agreement under these circumstances, each party should consider whether it intends to primarily disclose or receive information, and the relative value and sensitivity of the information to be exchanged, and adjust the operative provisions accordingly. For example, an outsourcing customer should ensure that the definition of confidential information is as broad as possible and that the recipient is subject to strict nondisclosure obligations. However, the service provider may want a narrower definition and less restrictive obligations.

In some circumstances, the parties may share certain confidential information with each other but not on a mutual basis. Instead of entering into a fully mutual confidentiality agreement, the parties enter into a reciprocal confidentiality agreement, in which the scope and nature of the confidential information that each party intends to disclose is separately defined and their respective nondisclosure obligations and access and use restrictions may differ accordingly. For example, in a typical outsourcing transaction, the service provider may be required to disclose only limited technical information and pricing details to the customer, while the service provider is to be given extensive access to sensitive information about the customer’s business methods and processes. In this situation, the customer may be especially concerned that this information is not shared with the service provider’s other customers, which may be the customer’s competitors.

LIMITATIONS AND RISKS OF CONFIDENTIALITY AGREEMENTS

Confidentiality agreements are very useful to prevent unauthorized disclosures of information but they have inherent limitations and risks, particularly when recipients have little intention of complying with them. These limitations include the following:

- Once information is wrongfully disclosed and becomes part of the public domain, it cannot later be “undisclosed.”
- Proving a breach of a confidentiality agreement can be very difficult (see *Contract Furniture Refinishing & Maint. Corp. of Georgia v. Remanufacturing & Design Grp., LLC*, 317 Ga. App. 47, 52-57 (2012)).
- Damages for breach of contract (or an accounting of profits, where the recipient has made commercial use of the information) may be the only legal remedy available once the information is disclosed. However, damages may not be adequate or may be difficult to ascertain, especially when the confidential information has potential future value as opposed to present value. For trade secret violations, the GTSA provides that damages may include both the actual loss and the unjust enrichment (that is not taken into account in computing the actual loss) (O.C.G.A. § 10-1-763(a)). Exemplary damages and attorneys’ fees are also available for “willful and malicious” misappropriation (O.C.G.A. §§ 10-1-763(b) and 10-1-764). In situations in which it would be unreasonable to prohibit future use, a court may issue an injunction conditioning future use on payment of a reasonable royalty (O.C.G.A. § 10-1-762(b)).
- Even where a recipient complies with all of a confidentiality agreement’s requirements, it may indirectly use the disclosed confidential information to its commercial advantage.

Despite these limitations, the commercial benefits of disclosing the information under a confidentiality agreement normally outweigh the risks. To protect its confidential information most effectively, the disclosing party should carefully manage the disclosure process and have a contingency plan for dealing with unauthorized disclosures by the recipient.

KEY PROVISIONS AND ISSUES

Confidentiality agreements, in their various forms, typically include the following key provisions:

- The persons or entities that are parties to the agreement (see Parties to the Agreement).
- The business purpose of the agreement (see Business Purpose).
- The definition of confidential information (see Definition of Confidential Information in the Agreement).
- What is excluded from the definition of confidential information (see Exclusions from the Definition).
- All nondisclosure obligations (see Nondisclosure Obligations).
- Any use and access restrictions (see Use and Access Restrictions).
- Any safekeeping and security requirements (see Safekeeping and Security Requirements).
- The agreement’s term and the survival of nondisclosure obligations (see Term of Agreement and Survival of Nondisclosure Obligations).
- Any provisions relating to the return or destruction of confidential information (see Return or Destruction of Confidential Information).

PARTIES TO THE AGREEMENT

The parties to the agreement are the business entities or individuals that are exchanging confidential information and are subject to the security requirements, use restrictions, nondisclosure obligations and the agreement’s other operative provisions. Although only the parties themselves are bound by the agreement, consider whether:

- The parties’ affiliates (including any parent and subsidiary entities) are the source of any of the confidential information to be shared under the agreement and whether any of them should be added as parties.
- Each party that is to be a recipient of confidential information may share it with its affiliates.
- The parties should be obligated to have employees and independent contractors who will have access to the information sign confidentiality and nondisclosure agreements.

Georgia law presumes that separate corporations are distinct entities (see *Yukon Partners, Inc. v. Lodge Keeper Grp., Inc.*, 258 Ga. App. 1, 5-6 (2002)). Accordingly, as a general rule, entities are not bound by the agreements of their affiliates. There are, however, several theories under which an affiliated entity may be bound by another corporation’s contract, including:

- Alter ego.
- Apparent authority.
- Ostensible authority.
- Agency.
- Joint venture.

(See *Kissun v. Humana, Inc.*, 267 Ga. 419, 419 (1997).)

Rather than relying on one of these theories to bind a non-signatory to a confidentiality agreement, the best practice is to include as a signatory party any affiliate that will be the source or recipient of confidential information.

A recipient party (and, if applicable, that party’s affiliates) is also often permitted to share confidential information with its business, financial, and legal advisors and other representatives. Representatives typically include the recipient’s:

- Officers, directors, employees, and other agents (such as shareholders or partners).
- Legal counsel.
- Accountants.
- Financial and tax advisors.

In some cases, the recipient party may prefer to have certain of its representatives enter into separate confidentiality agreements with the other party, rather than be held responsible for the representatives’ compliance with the principal agreement.

For more information on permitting disclosure of confidential information to a party’s representatives, see Standard Document, Confidentiality Agreement: General (Short Form, Mutual) (GA): Disclosure and Use of Confidential Information ([W-008-9296](#)).

BUSINESS PURPOSE

Many confidentiality agreements limit the disclosure or exchange of confidential information to a specified business purpose, such as “to evaluate a potential marketing arrangement between the parties.” A defined business purpose is especially useful as a basis for access and use restrictions in the agreement. For example, confidentiality agreements can restrict the disclosure of confidential information to the recipient, its affiliates, and representatives solely for use in connection with the stated purpose (see, for example, Standard Document, Confidentiality Agreement: General (Short Form, Mutual) (GA): Section 1 ([W-008-9296](#))).

DEFINITION OF CONFIDENTIAL INFORMATION IN THE AGREEMENT

Defining what information and data is confidential is central to any confidentiality agreement. In addition to state requirements for confidential information (see Definition of Confidential Information Under Georgia Law), parties need to carefully define the confidential information in the agreement. Disclosing parties should:

- Ensure that confidential information is defined broadly enough to cover all of the information they (or their affiliates) may disclose, as well as any that may have been previously disclosed.
- Consider specifying the types of information that are defined as confidential information, to avoid the agreement being later deemed unenforceable because of an overly broad definition.
- Consult the GTSA, DTSA and Section 13-8-51(3) when defining confidential information (O.C.G.A. § 10-1-760 et seq.; 18 U.S.C.A. §§ 1831 to 1839; and O.C.G.A. § 13-8-51(3)).

The types of information that are commonly defined as confidential include:

- Business and marketing plans, strategies, and programs.
- Financial budgets, projections, and results.
- Employee and contractor lists and records.
- Business methods and operating and production procedures.
- Technical, engineering, and scientific research, development, methodology, devices, and processes.
- Formulas and chemical compositions.
- Blueprints, designs, and drawings.
- Trade secrets and unpublished patent applications.
- Software development tools and documentation.
- Pricing, sales data, prospects and customer lists, and information.
- Supplier and vendor lists and information.
- Terms of commercial contracts.

In addition to business information that is actually disclosed or exchanged by the parties, confidential information may also include:

- Any information that a recipient derives from the discloser’s confidential information. For example, a recipient may use confidential data in its financial projections.
- The fact that the parties are discussing and potentially entering into a particular relationship. It can be very damaging if a

company’s customers, competitors, or other interested parties find out about a deal before a formal announcement is made.

- The existence and terms of the confidentiality agreement itself.

Confidential information should include information entrusted to a party by its affiliates and by third parties, such as customers, which may itself be subject to “upstream” confidentiality agreements with the third parties (see, for example, Standard Clauses, General Contract Clauses: Confidentiality (Long Form) (GA): Section 1.1(d) ([W-000-0955](#))).

The definition of confidential information should state the possible forms in which it may be disclosed (written, electronic, and oral) and whether the disclosed material must be marked “confidential” or otherwise designated as confidential.

Where especially sensitive or valuable confidential information is to be disclosed, numbered, printed copies may be distributed to specified individuals, so that all copies can be collected at the conclusion of the transaction (see Safekeeping and Security Requirements). Alternatively, if information is disclosed in an electronic format, technological methods should be employed to limit the copying or dissemination of the information and allowing for tracking of the information to ensure it has been deleted and/or returned at the conclusion of the transaction or relationship.

EXCLUSIONS FROM THE DEFINITION

Recipients should ensure there are appropriate exclusions from the definition (which can be broader or narrower, depending on the party). Typical exclusions include information that:

- Is or becomes public other than through a breach of the agreement by the recipient.
- Was already in the recipient’s possession or was available to the recipient on a non-confidential basis before disclosure.
- Is received from a third party that is not bound by separate confidentiality obligations to the other party.
- Is independently developed by the recipient without using the confidential information.
- Does not have value.
- Is generally known.

NONDISCLOSURE OBLIGATIONS

Recipients of confidential information are generally subject to an affirmative duty to keep the information confidential, and not to disclose it to third parties except as expressly permitted by the agreement. The recipient’s duty is often tied to a specified standard of care. For example, the agreement may require the recipient to maintain the confidentiality of the information using the same degree of care used to protect its own confidential information, but not less than a “reasonable” degree of care.

Recipients should ensure there are appropriate exceptions to the general nondisclosure obligations, including for disclosures:

- **To its representatives.** Most confidentiality agreements permit disclosure to specified representatives for the purpose of evaluating the information and participating in negotiations of the principal agreement (see Parties to the Agreement).

- **Required by law.** Confidentiality agreements usually allow the recipient to disclose confidential information if required to do so by court order or other legal process. The recipient usually has to notify the disclosing party of this order (if legally permitted to do so) and cooperate with the disclosing party to obtain a protective order.

Disclosing parties commonly try to ensure that recipients are required to have “downstream” confidentiality agreements in place with any third parties, including affiliates, representatives, contractors, and subcontractors, to which later disclosure of confidential information is permitted. In these cases, either the recipient or the discloser may prefer to have these third parties enter into separate confidentiality agreements directly with the discloser.

USE AND ACCESS RESTRICTIONS

Apart from a recipient’s nondisclosure obligations, confidentiality agreements typically limit access to and use of the information even within the recipient’s organization. For example, access and use may be restricted to the recipient’s employees who have a “need to know” the information solely for the defined business purpose.

SAFEKEEPING AND SECURITY REQUIREMENTS

Recipients may be required to adopt specific physical and network security methods and procedures to safeguard the discloser’s confidential information. Some agreements require that confidential information be segregated in a “data room,” with a log of all internal access and third-party disclosures. Many industries and companies have best practices for safeguarding confidential information, including the adoption of identity assurance and credential management with each level representing a different degree of certainty in the identity of the user. Other requirements may relate to the use of mobile devices and encrypting stored electronic information.

Recipients may also be obligated to notify the disclosing party of any security breaches or unauthorized disclosures.

TERM OF AGREEMENT AND SURVIVAL OF NONDISCLOSURE OBLIGATIONS

Confidentiality agreements can run indefinitely, covering the parties’ disclosures of confidential information at any time, or can terminate on a certain date or event, such as the:

- Conclusion of the defined business purpose.
- Signing of a principal agreement.

Whether or not the overall agreement has a definite term, the parties’ nondisclosure obligations can be stated to survive for a set period, running for some number of years from the date on which information is actually disclosed. Survival periods of one to five years are typical.

Disclosing parties typically prefer an indefinite period while recipients generally favor a fixed term. The term often depends on the type of information involved and how quickly the information changes. Some information becomes obsolete fairly quickly, such as marketing strategies or pricing arrangements. Other information may need to remain confidential long into the future, such as:

- Customer lists, which can always be protected provided they otherwise qualify as confidential information or trade secrets under the appropriate statute.

- Certain technical information.
- The non-public components of business methods.

Under the GTSA, trade secrets are protected as long as they remain secret (O.C.G.A. § 10-1-760 et seq.). Under the Georgia restrictive covenant statute, confidential information can be protected by an agreement as long as it remains confidential (O.C.G.A. § 13-8-53(e)). However, the better practice is to include a time limit with respect to confidential information when possible. Two years is a typical time period in Georgia, however courts have upheld nondisclosure covenants with longer durations (see, for example, *American Software USA, Inc. v. Moore*, 264 Ga. 480, 483 (1994) (the court upholding a nondisclosure covenant with a ten year time limit)).

RETURN OR DESTRUCTION OF CONFIDENTIAL INFORMATION

Disclosing parties should ensure they have rights to the return of their confidential information on termination of the confidentiality agreement or at any time on their request.

Recipients often want the option to destroy the confidential information instead of returning it to the disclosing party. In the course of evaluating the other party’s confidential information, conducting due diligence, or negotiating a principal agreement, a recipient may combine its own confidential information with that of the discloser. In that situation, the recipient usually wants to destroy the information because returning it means disclosing its own confidential information. Disclosing parties usually allow this destruction option but often require the recipient to certify in writing that the information was in fact destroyed. Disclosing parties should be especially aware of this risk because there is no way for a disclosing party to be sure that a recipient has destroyed the information.

It is often not practical for a recipient to certify that all confidential information has been destroyed, due to the widespread use of automated network back-up programs and e-mail archive systems. For this reason, a recipient may try to include language that allows archival copies to be retained (see, for example, Standard Clauses, General Contract Clauses: Confidentiality (Long Form) (GA): Section 1.4(c) ([W-000-0955](#))). This issue is usually fact specific and should be negotiated between the parties.

Recipients also try to include language that allows them to keep copies of confidential information for evidentiary purposes or if required to do so by law or professional standards. Disclosing parties agree to this but sometimes require that the recipients’ outside attorneys keep the copies to protect against abuses.

GENERAL PROVISIONS

Confidentiality agreements may also include any of the following general provisions.

Intellectual Property Rights

Confidentiality agreements typically provide that the disclosing party retains any and all of its intellectual property rights in the confidential information that it discloses, and disclaim any grant of a license to the recipient (see, for example, Standard Document, Confidentiality Agreement: General (Short Form, Mutual) (GA): Section 6 ([W-008-9296](#))).

Warranty Disclaimers

It is common for the disclosing party to disclaim all warranties on the accuracy and completeness of its confidential information (see, for example, Standard Document, Confidentiality Agreement: General (Short Form, Mutual) (GA): Section 5 ([W-008-9296](#))).

No Further Obligations

Each party may want to expressly state that it has no obligation to enter into any transaction beyond the confidentiality agreement itself (see, for example, Standard Document, Confidentiality Agreement: General (Short Form, Mutual) (GA): Section 5 ([W-008-9296](#))).

Non-Solicitation

In some situations, confidentiality agreements prohibit one or both parties from soliciting or offering employment to the other party's employees. Some non-solicitation provisions also prohibit establishing relationships with customers and suppliers of the other party. These provisions must be narrowly drafted to avoid potential restraints on trade, and may be unenforceable if drafted more broadly than reasonably necessary to protect a party's interests (see, for example, Standard Clauses, Confidentiality Agreement: Non-Solicitation Clause (GA) ([W-008-9294](#))).

Certain non-solicitation covenants are governed by Georgia's current restrictive covenant statute (O.C.G.A. § 13-8-50 et seq.) if they are included in agreements entered into after May 11, 2011. This statute is applicable to agreements between:

- Employers and employees.
- Distributors and manufacturers.
- Lessors and lessees.
- Partnerships and partners.
- Franchisors and franchisees
- Sellers and purchasers of a business or commercial enterprise.
- Two or more employers.

(O.C.G.A. § 13-8-52(a)).

Under Georgia's restrictive covenant statute:

- Covenants prohibiting the solicitation of customers and prospective customers with whom the contracting party had material contact are permitted. "Material contact" is defined broadly under the statute (O.C.G.A. § 13-8-51(10)).
- The duration of the covenant is subject to certain rebuttable presumptions regarding reasonableness (O.C.G.A. § 13-8-57). For example, restrictive covenants between a manufacturer and a distributor that endure for three years or less (from the date the business relationship terminates) are presumed reasonable but a restraint of more than three years is presumed to be unreasonable (O.C.G.A. § 13-8-57(c)).
- Guidelines regarding the scope of such provisions that could impact their enforceability are provided (O.C.G.A. § 13-8-50 et seq.).
- Covenants that apply during the term of the parties relationship, rather than post-termination, are also addressed (O.C.G.A. § 13-8-56(4)).

To the extent an agreement is not the type of agreement covered by Section 13-8-52(a), the common law must be considered. The

common law requires that any such covenants meet much more stringent guidelines with respect to their scope. For example:

- In *Hulcher Servs., Inc. v. R.J. Corman R.R. Co., LLC*, the court held that a non-solicitation covenant cannot prohibit the solicitation of all clients unless the covenant has an express, reasonable territorial limitation (247 Ga. App. 486 (2001)).
- In *W.R. Grace & Co. v. Mouyal*, the court stated that a non-solicitation clause that prohibits the solicitation of those clients that were actually contacted for a business purpose can be enforced notwithstanding the absence of a geographical limitation (262 Ga. 464 (1992)).
- In *Trujillo v. Great S. Equip. Sales, LLC*, the court found a non-solicitation covenant that covered customers about whom the employee had confidential or proprietary information without regard to whether the party had contact with those customers unenforceable (289 Ga. App. 474 (2008)).

Georgia statutes do not directly provide rules to govern the enforceability of employee non-solicitation or no-hire covenants, although the statutory definition of a "restrictive covenant" does include an agreement between two or more parties that exists to protect the first party's employees (O.C.G.A. § 13-8-51(15)). For agreements not covered by Section 13-8-52(a), under Georgia's common law, employee non-solicitation covenants are more freely enforced than non-competes and customer non-solicitation covenants (see, for example, *CMGRP, Inc. v. Gallant*, 343 Ga. App. 91 (2017)).

Announcements and Publicity

As an exception to parties' nondisclosure obligations, there may be a provision permitting either or both parties to announce or publicize the fact or terms of their relationship, usually subject to prior approval by the other party (see, for example, Standard Clause, General Contracts Clauses: Public Announcements ([2-523-8703](#))).

Equitable Relief

To mitigate the potential consequences of unauthorized disclosures, confidentiality agreements often include an acknowledgement that a disclosing party should be entitled to injunctive relief to stop further disclosure of the confidential information, in addition to monetary damages and other remedies (see, for example, Standard Document, Confidentiality Agreement: General (Short Form, Mutual) (GA): Section 8 ([W-008-9296](#))).

Georgia courts have held that, injunctive relief is appropriate:

- When a restrictive covenant is found to be enforceable (see, for example, *Rash v. Toccoa Clinic Med. Assocs.*, 253 Ga. 322, 326 (1984) and *Bijou Salon & Spa, LLC v. Kensington Enters., Inc.*, 283 Ga. App. 857, 860 (2007)).
- For breach of restrictive covenant agreements, since damages are often difficult to calculate and an award of damages often does not sufficiently vindicate the rights of the party seeking to enforce the covenants (see *Poe & Brown, Inc. v. Gill*, 268 Ga. 749, 750 (1997)).

Indemnification

In addition to the right to seek equitable relief, disclosing parties sometimes try to include an indemnification provision holding

the recipient responsible for all costs relating to the enforcement of the agreement. Recipients typically resist this language. A typical compromise is to have the losing side in any dispute pay the winner's fees and expenses, including legal fees (see Standard Document, Confidentiality Agreement: General (Short Form, Mutual) (GA): Equitable Relief ([W-008-9296](#))). For more information about indemnification in Georgia in general, see Practice Note, Indemnification Clauses in Commercial Contracts (GA) ([W-009-2443](#)).

Governing Law, Jurisdiction, and Venue

State laws vary on the validity and enforceability of certain provisions in confidentiality agreements, such as the allowable duration of nondisclosure obligations and the scope of non-solicitation provisions. Each party should consult with counsel qualified in the state before entering into a confidentiality agreement governed by the laws of Georgia. For sample governing law, jurisdiction, and venue provisions, see Standard Clauses, General Contract Clauses: Choice of Law (GA) ([W-000-0988](#)) and Choice of Forum (GA) ([W-000-0986](#)).

Georgia courts have held a choice of law provision in a restrictive covenant agreement that calls for the law of another jurisdiction to apply will not be enforced by Georgia courts where the foreign jurisdiction's law contravenes the public policy of the state of Georgia (see *Convergys Corp. v. Keener*, 276 Ga. 808, 808-09 (2003); see also *Hostetler v. Answerthink, Inc.*, 267 Ga. App. 325, 327 (2004)).

Although forum selection provisions are prima facie valid and presumptively enforceable in Georgia, if a restrictive covenant violates Georgia public policy and would likely be enforced in the parties' selected forum, then a Georgia court may invalidate the forum selection clause (see, for example, *Bunker Hill Int'l, Ltd. v. Nationsbuilder Ins. Servs., Inc.*, 309 Ga. App. 503 (2011)).

Given the substantial change in the law for agreements entered into after May 11, 2011 and Georgia's public policy regarding restrictive covenant agreements, it is now much more difficult to establish that the law of another state contravenes the public policy of Georgia. Drafters should keep this issue in mind, however, when including choice of law, jurisdiction and venue clauses that involve companies or individuals doing business in Georgia.

ABOUT PRACTICAL LAW

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at legalsolutions.com/practical-law. For more information or to schedule training, call **1-800-733-2889** or e-mail referenceattorneys@tr.com.