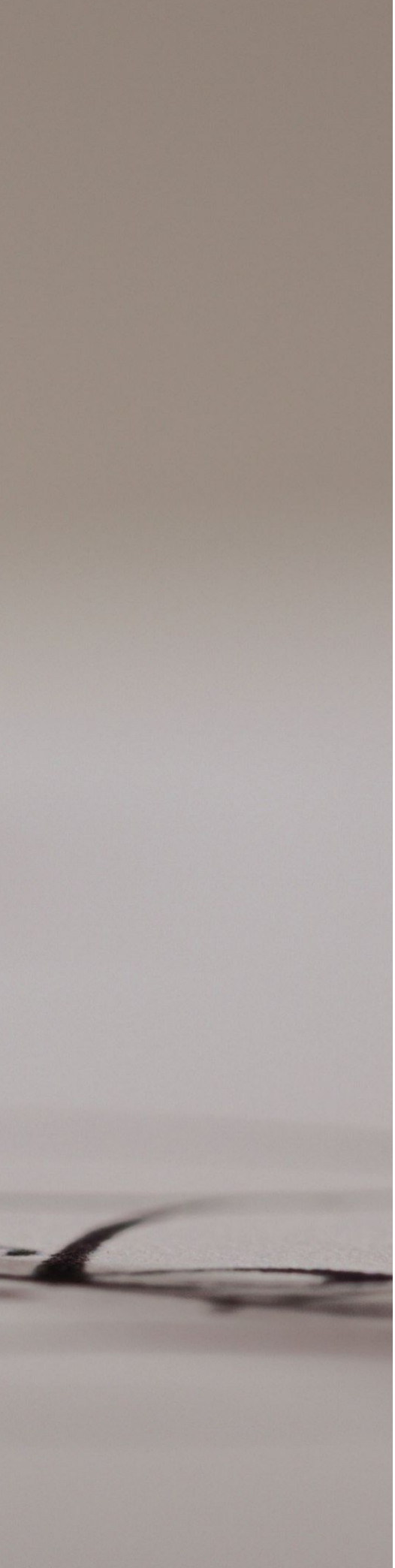
October 2020 Volume 26, Number 2

GEORGIA BAR
JOURNAL

Nearly a Decade Later: Surveying Georgia's "New" Noncompete Law



GETTYIMAGES.COM/ARTISTEERDARKER

Nearly a Decade Later: Surveying Georgia's "New" Noncompete Law

This article discusses the flurry of decisions issued by the Court of Appeals of Georgia providing guidance on the "new" noncompete law, as well as several opinions of significance from the federal judiciary.

BY NEAL F. WEINRICH AND ASHLEY M. BOWCOTT

Georgia historically disfavored covenants not to compete and other restrictive covenants, particularly in the employment context.[1] This hostility was rooted in Georgia's Constitution, which provided that all contracts that had the effect of or were intended to defeat or lessen competition or encourage monopolies were illegal and void.[2]

In the mid-2000's, members of Georgia's business community started lobbying for revisions to Georgia's restrictive covenant law. A legislative committee studied the issue and concluded that a change in the law would help keep businesses in Georgia, as well as attract new businesses. The committee recommended that the General Assembly enact legislation revising Georgia's restrictive covenant law, which it did in 2009.[3] However, that law could not take effect until a referendum amending Georgia's Constitution passed.[4] In November 2010, the voters approved a referendum.[5] Because there were questions about the validity of the law—since the law took effect before the constitutional amendment allowing the law had technically taken effect—the Georgia General Assembly reenacted the legislation in substantially the same form.[6] The reenacted legislation took effect on May 11, 2011 (the "Act"), drastically changing restrictive covenant law in Georgia in many ways. Perhaps the most notable change is that Georgia courts can now modify unreasonable restraints.

The Act does not apply to contracts signed before the new law took effect.[7] Therefore, shortly after the Act's passage, many noncompete disputes still involved covenants governed by Georgia's common law. Over time, however, many Georgia employers implemented new restrictive covenant agreements, and more and more disputes involve covenants governed by the Act. Although it took longer than many expected to see appellate case law interpreting the Act, in the last few years the Court of Appeals of Georgia has issued a flurry of decisions providing guidance on the Act. This article discusses those decisions as well as several opinions of significance from the federal judiciary.

Who can be subject to a noncompete under the Act?

Although the drafters of the Act set out to make noncompetes and other restrictive covenants easier to enforce, they were also cognizant that not all employees should be subject to post-termination noncompetes. In striking this balance, the Act only allows post-termination noncompetes with employees who:

> (1) [c]ustomarily and regularly solicit for the employer customers or prospective customers;
> (2) [c]ustomarily and regularly engage in making sales or obtaining orders or contracts for products or services to be performed by others;
> (3) [p]erform the following duties:
>
> > (A) [h]ave a primary duty of managing the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
> > (B) [c]ustomarily and regularly direct the work of two or more other employees; and
> > (C) [h]ave the authority to hire or fire other employees or have particular weight given to suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees; or
>
> (4) [p]erform the duties of a key employee or of a professional.[8]

Although the drafters of the Act set out to make noncompetes and other restrictive covenants easier to enforce, they were also cognizant that not all employees should be subject to post-termination noncompetes.

Although executives, high-level managers and true salespeople clearly seem to come within the reach of the Act, the Act leaves substantial room for disagreement about whether noncompetes are allowed for many other types of employees. This section of the Act is also rife for overzealous employers using noncompetes against employees whom the General Assembly did not intend to be subject to noncompetes. The Court of Appeals of Georgia's recent decision in *Blair v. Pantera Enterprises, Inc.*, illustrates such a situation.[9] Blair worked for Pantera as a backhoe operator and laborer, and he primarily provided services to Pantera's customer, Norfolk Southern, in a specific territory. Blair signed a noncompete with Pantera that prohibited him from operating a backhoe on railways owned or leased by Norfolk Southern for two years after his employment ended. He made $13 an hour, did not have authority to hire or fire people, did not regularly direct the work of anyone other than his truck driver, was not involved in sales and was not involved in negotiating contracts with Norfolk Southern.

In 2017, Blair left Pantera to work for a competitor where he would be paid $20 an hour. Norfolk Southern redirected its track maintenance business to Blair's new employer because Norfolk Southern felt it could not find a suitable replacement for him. Pantera filed suit and argued that by virtue of his reputation and training, Blair was a "key employee" under O.C.G.A. Section 13-8-53(a)(4) who could be subject to a noncompete. The trial court accepted Pantera's argument and enjoined him from operating a backhoe for Norfolk Southern in the relevant territory for the two-year period.

On appeal, the Court of Appeals of Georgia held that to interpret O.C.G.A. Section 13-8-51(8) (which defines "key employee") to include an employee like Blair "would create an unintended restriction on trade and run counter to the balance the legislature sought to create by limiting the application of the [A]ct."[10] The court held that the phrase "key employee" was not meant to include every employee. Rather, according to the court, *both* sentences of

O.C.G.A. Section 13-8-51(8) must apply for an employee to be a "key employee." The legislature's intent to limit the coverage of the Act to certain employees would be frustrated if the court construed O.C.G.A. Section 13-8-51(8) to mean that any person in possession of selective or specialized skills, learning or abilities obtained by reason of having worked for an employer, who would already be considered an "employee" under O.C.G.A. Section 13-8-51(5), would also be a "key employee." Analyzing whether Blair met the first sentence of O.C.G.A. Section 13-8-51(8), the court held that even if his good reputation with Norfolk Southern was sufficient for him to have a "high level of notoriety, fame, reputation, or public persona as the employer's representative," he would be a key employee only if that level of notoriety, fame, reputation or public persona was gained "*by reason of* the employer's investment of time, training, money, trust, exposure to the public, or exposure to customers, vendors, or other business relationships during the course of the employee's employment with the employer."[11] Although Blair was Norfolk Southern's preferred backhoe operator, it was because of his positive attitude, reliability and proficiency from his own work ethic and personal attributes, not *by reason of* Pantera's investment in him. Therefore, he was not a key employee under the Act, and the court vacated the trial court's injunction.[12]

The analysis in *Blair* is limited to what constitutes a "key employee." Two other decisions, one from the Court of Appeals of Georgia and one from the Northern District of Georgia, address the other prongs of O.C.G.A. Sections 13-8-53(a)(1)-(4).

Kennedy v. The Shave Barber Co., LLC involved a dispute over a hair stylist's noncompete and non-solicits.[13] After several employees left and opened competing barbershops, the owner of The Shave required its stylists, including Kennedy, to sign agreements containing a three-mile noncompete, a customer non-solicit and an employee non-recruitment covenant. Kennedy resigned and opened her own salon within the radius. She announced her resignation via social media and "tagged" The Shave in her post, so the post appeared on The Shave's social media. She also reposted photos taken at The Shave, tagging some of The Shave's customers. The Shave filed a lawsuit and obtained an injunction enforcing the restrictive covenants.

On appeal, Kennedy argued that she was not the type of employee against whom a noncompete could be enforced. She also argued she was not even an "employee" at all within the meaning of the Act. O.C.G.A. Section 13-8-51(5) defines an "employee" as including any person "in possession of selective or specialized skills, learning, or abilities or customer contacts, customer information or confidential information." O.C.G.A Section 13-8-53(a)(1) permits noncompetes against employees who "customarily and regularly solicit for the employer customers or prospective customers." While employed, Kennedy regularly posted her work schedule and a link to The Shave's website to her social media accounts, she encouraged clients and potential clients to patronize The Shave, and she posted photographs of services she provided and tagged The Shave in her posts. She provided services to 230 repeat customers per month. Based on this evidence, the Court of Appeals concluded that the trial court was within its discretion to find that she was an "employee" that customarily and regularly solicited customers or prospects.

In *CSM Bakery Solutions, LLC v. Debus*, Judge Timothy C. Batten Sr. of the Northern District of Georgia also weighed in on what types of employees may be subject to a noncompete under the Act.[14] CSM, a bakery manufacturer, sued Debus after she went to work for a competitor. Judge Batten initially entered an injunction enforcing the noncompete; however, after some discovery, he dissolved the injunction, finding that Debus was not the type of employee for whom noncompetes are allowed. CSM argued that Debus regularly solicited and made sales to one of CSM's customers and cited her self-evaluation as proof. Judge Batten did not find this evidence compelling because the self-evaluation showed she did not consider her job to involve sales. He also credited her deposition testimony regarding her lack of involvement in sales, finding that she would have been incentivized "to cast her responsibilities in the most expansive light" in the evaluation.[15]

CSM also relied on Debus's promotion to the position of sales representative as evidence that she was involved in sales. Judge Batten rejected this argument and found that Debus' title was not conclusive as to her actual duties, and indeed, her supervisor's testimony showed her day-to-day duties did not involve soliciting customers. CSM also relied on a handful of emails from Debus' five years of employment, which evidenced some involvement in sales; however, Judge Batten found that if Debus had been "regularly" involved in sales, there would be substantially more evidence, and the emails CSM relied upon showed she had to seek permission from her superiors on sales matters.[16] Judge Batten also generally noted the *lack* of the basic evidence one would expect if an employee had been regularly involved with solicitation or sales, such as sales records and commissions sheets.[17] He found that if he interpreted O.C.G.A. Sections 13-8-53(a)(1) and (2) in the way CSM suggested, the limitations upon whom noncompetes can be used would be meaningless and noncompetes could be used with every employee who positively impacts sales efforts.[18]

CSM also argued that O.C.G.A. Section 13-8-53(a)(3) applied to Debus because she managed two employees, could hire and fire, and described her role as "managing a territory."[19] Although Judge Batten acknowledged she supervised some employees, he found that CSM had not shown that she "customarily and regularly" managed her employees, and that she still had to report to her supervisors with respect to her primary account.[20]

Like the employer in *Blair*, CSM also argued that Debus was a "key employee" under O.C.G.A. Section 13-8-53(a)(4) based on her strong reputation with a customer.[21] Judge Batten concluded that "her role and status within the company [did] not indicate that she was a key employee" among CSM's thousands of employees worldwide. Rather, she was a low-level employee. Judge Batten rejected the notion that "virtually any employee

with customer interaction" becomes a "key employee."[22]

Blair, Kennedy and *CSM* thus illustrate that the question of whether an employee may be subject to a noncompete under the Act remains murky for many types of employees. This question remains rife for dispute and will continue to be litigated in cases involving employees not clearly covered by the Act.

What are trial courts' modification powers under the Act?

Under the common law prior to the Act, if a trial court found that a covenant was overbroad, the court could not modify it to make the restriction reasonable.[23] Moreover, if a noncompete or customer non-solicit in an employment agreement was found to be overbroad and unenforceable, the other noncompetes or customer non-solicits in the agreement were also rendered unenforceable.[24] The Act changed these rules by allowing courts to modify overbroad restrictions.

The extent of a court's authority to modify covenants has been the subject of much discussion and litigation: can a court merely "strike" offensive portions of a covenant, or can a court insert missing language to make an overbroad covenant reasonable? Similarly, can a court rewrite a covenant that is overbroad or unreasonable in some respect? The Act itself does not provide clear answers. O.C.G.A. Section 13-8-54(b) provides that ". . . if a court finds that a contractually specified restraint does not comply with the provisions of Code Section 13-8-53, then the court may modify the restraint provision and grant only the relief reasonably necessary." "Modify" means "to make, to cause, or otherwise to bring about a modification."[25] "'Modification' means the limitation of a restrictive covenant to render it reasonable in light of the circumstances in which it was made. Such term shall include: (A) [s]evering or removing that part of a restrictive covenant that would otherwise make the entire restrictive covenant unenforceable; and (B) [e]nforcing the provisions of a restrictive covenant to the extent that the provisions are reasonable."[26] A modification cannot render the covenant more restrictive than as originally drafted.[27]

Several decisions from the Court of Appeals of Georgia have addressed trial courts' modification powers under the Act. In *Kennedy*, the noncompete in the hair stylist's agreement prohibited her from working in the men's grooming industry within a three-mile radius of *any location of The Shave*. However, the salon operated only one location and had no plans to open others. The trial court therefore modified the noncompete to cover three miles from only the existing Virginia-Highlands location and not any future locations. In her appeal, Kennedy argued that the geographic restriction in her noncompete was unreasonable. Given that most of The Shave's customers live and work within three miles of the Virginia Highlands location, and given that the trial court's limiting the noncompete to only the existing location, the Court of Appeals of Georgia affirmed the injunction and rejected Kennedy's argument that the territory was unreasonable.[28]

Kennedy was the first published opinion from the Court of Appeals of Georgia approving a trial court's modification of a noncompete pursuant to the Act. In *Belt Power v. Reed*, the Court of Appeals again acknowledged the trial court's discretionary modification powers.[29] *Belt Power* involved the enforceability of no-hire and employee non-recruitment covenants. The trial court concluded that these covenants were not governed by the Act and were unenforceable under the common law. The trial court also made the alternative finding that the covenants were unenforceable under the Act and declined to modify them.[30] As discussed below, the Court of Appeals disagreed with the trial court and held that such covenants are governed by the Act. As to the second issue, Belt Power argued that the trial court abused its discretion in declining to modify the covenants. The Court of Appeals observed that O.C.G.A. Section 13-8-54(b) provides a trial court "may modify" an overbroad covenant and confirmed that this language means modification is not mandatory. To the contrary, "it is within a trial court's discretion whether or not to apply the Act's blue pencil provisions."[31] The Court of Appeals found that the trial court had properly considered Belt Power's legitimate business interests and was within its discretion to decline to modify the covenants to make them enforceable.[32]

These two cases do not answer the questions of whether a trial court can only strike language, whether a trial court can rewrite a covenant or whether a trial court could supply missing language.[33] Several federal district court decisions have explored these questions. *LifeBrite Laboratories, LLC v. Cooksey* involved a noncompete without any territorial limitation.[34] Judge Thomas W. Thrash Jr. thus had to decide whether the term "modify" under the Act means courts "may only excise offending language" or whether they "are empowered to actually reform and rewrite the contract."[35] He found that the Act permits excising overbroad language but does not address whether courts can insert missing language. Judge Thrash therefore looked to pre-Act case law on blue-penciling, which under the common law was only allowed for covenants ancillary to the sale of a business.[36] In a 1990 case, the Supreme Court of Georgia stated that "[t]he 'blue pencil' marks, but it does not write."[37] Concluding that "[n]othing in the [Act] makes it clear that the legislature meant to change Georgia's common law approach to blue penciling other than to allow it in more circumstances," Judge Thrash held that, under the Act, ". . . courts may not completely reform and rewrite contracts by supplying new material terms from whole cloth."[38]

Although no other court has disagreed with Judge Thrash and concluded that a missing territory can be added to a noncompete, other judges have taken different approaches in different circumstances. In *Cunningham Lindsey U.S. LLC v. Box*, a nonsolicit restricted solicitation "within the territory of the office in which Employee is employed."[39] Judge Mark H. Cohen found that this territory was ambiguous and blue-penciled it to apply to "Atlanta, Georgia."[40] In *Pan Am Dental, Inc. v. Trammell*, Judge William T. Moore Jr. found a noncompete that applied during the term of an independent contractor relationship and that required the contractor to devote his entire

working time to promoting the company and also required the contractor not to act on behalf of any other firm was too broad in that it prohibited the contractor from engaging *in any other work* during the relationship, even if the other work was not competitive.[41] Judge Moore, therefore, rewrote this covenant to only prohibit the contractor from working for a business in competition with the company.[42]

Are non-recruitment covenants covered by the Act?

Belt Power confirms the Act applies to no-hire and employee non-recruitment covenants.[43] As discussed above, the trial court in *Belt Power* struck down the covenants, finding the Act does not govern such covenants and that the covenants at issue were unenforceable under the common law. The Court of Appeals of Georgia reversed the former finding but affirmed the trial court's alternative holding that the covenants were unenforceable under the Act. In concluding that the Act applies to no-hire and employee non-recruitment covenants, the Court of Appeals noted that O.C.G.A. Section 13-8-51(15) defines a "restrictive covenant" as "an agreement between two or more parties that exists to protect the first party's or parties' interest in property, confidential information, customer good will, business relationships, [or] *employees*."[44] The Court of Appeals then considered O.C.G.A. Section 13-85-4(b), which states "[i]n any action concerning enforcement of a restrictive covenant, a court shall not enforce a restrictive covenant unless it is in compliance with the provisions of O.C.G.A. Section 13-8-53 . . .".[45] Construing these two parts of the statute together, the Court of Appeals concluded no-hire and employee non-recruitment covenants are subject to the statute and must meet the Act's requirements.[46]

Conclusion

The Court of Appeals of Georgia and the federal district courts have started unravelling many of the key interpretational questions wrapped into the Act. Courts have touched upon other issues not discussed above, but many questions have not been fully answered, e.g., what proffered legitimate business interests are sufficient or insufficient under O.C.G.A. Section 13-8-55 to support a noncompete?;[47] are there limits when using a list of competitors as a substitute for a geographic restriction in a noncompete as set forth in O.C.G.A. Section 13-8-56(B)?;[48] are noncompetes that restrict an employee from working in "any capacity" permitted?;[49] when does economic hardship bar enforcement of a noncompete under O.C.G.A. Section 13-8-58(d)?;[50] how will Georgia courts analyze choice of law provisions in agreements governed by the Act?[51] These and many other questions related to the Act that are beyond the scope of this article have yet to be addressed in published decisions and will likely continue to be litigated in the years to come. ●

Neal Weinrich is a shareholder at Berman Fink Van Horn P.C. in Atlanta. He concentrates his practice on commercial litigation involving restrictive covenants, trade secrets, computer fraud and other competition-related issues. Weinrich represents employers and employees from a wide variety of industries in unfair competition disputes in courts in Georgia and other jurisdictions, as well as in arbitral forums. He is also the co-founder of and a regular contributor to *Georgia Non-Compete and Trade Secret News* (www.georgia-noncompete.com).

Ashley Bowcott is an associate at Berman Fink Van Horn P.C. in Atlanta. She concentrates her practice on commercial litigation involving restrictive covenants, trade secrets and other competition-related issues, as well as labor and employment disputes.

Endnotes

1. *See, e.g.*, Singer v. Habif, Arogeti & Wynne, P.C., 250 Ga. 376, 377, 297 S.E.2d 473, 475 (1982).
2. The Constitution previously stated, "The General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition, or encouraging a monopoly, which are hereby declared to be unlawful and void." Ga. Const. art. III, § VI, para. V(c) (amended by Ga. Const. art. III, § VI, para. V(c)(1)-(3)). The Constitution now states, "The General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of encouraging a monopoly, which is hereby declared to be unlawful and void. Except as otherwise provided in subparagraph (c)(2) of this paragraph, the General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition, which is hereby declared to be unlawful and void." Ga. Const. art. III, § VI, para. V(c)(1); *see also* Ga. Const. art. III, § VI, para. V(c)(2) ("The General Assembly shall have the power to authorize and provide by general law for judicial enforcement of contracts or agreements restricting or regulating competitive activities between or among: (A) Employers and employees; (B) Distributors and manufacturers; (C) Lessors and lessees; (D) Partnerships and partners; (E) Franchisors and franchisees; (F) Sellers and purchasers of a business or commercial enterprise; or (G) Two or more employers.").
3. HB 173, 150th Leg., Reg. Sess. (Ga. 2009).
4. Prior efforts to reform Georgia's restrictive covenants law had been struck down as violative of Georgia's Constitution. Jackson & Coker, Inc. v. Hart, 261 Ga. 371, 405 S.E.2d 253 (1991).
5. HR 178, 150th Leg., 2d Sess. (Ga. 2010)
6. The original legislation by its terms took effect on the day following the ratification of the constitutional amendment. *See* HB 173, 150th Leg., Reg. Sess. (Ga. 2009), at § 4. However, under article X, section 1, paragraph VI of the Georgia Constitution, an amendment to the Constitution becomes effective on the first day of January following its ratification, unless the amendment or the resolution proposing the amendment provides otherwise. Neither the amendment nor the resolution authorizing the amendment stated that it would go into effect immediately. Therefore, the amendment to the Constitution did not go into effect until January 1, 2011, resulting in an approximately two-month period when the legislation had gone into effect but

the amendment had not. As this "gap" period raised questions about the proper constitutional foundation of the original legislation, the new law was reenacted.

7. HB 30, 151st Leg., Reg. Sess. (Ga. 2011), at § 5; *see also* Gordon Document Prods., Inc. v. Serv. Techs., Inc., 308 Ga. App. 445, 448 n.5, 708 S.E.2d 48, 57 n.5 (2011) (applying common law to 2003 and 2007 agreements).
8. O.C.G.A. § 13-8-53(a) (2012).
9. 349 Ga. App. 846, 824 S.E.2d 711 (2019).
10. "Key employee means an employee who, by reason of the employer's investment of time, training, money, trust, exposure to the public, or exposure to customers, vendors, or other business relationships during the course of the employee's employment with the employer, has gained a high level of notoriety, fame, reputation, or public persona as the employer's representative or spokesperson or has gained a high level of influence or credibility with the employer's customers, vendors, or other business relationships or is intimately involved in the planning for or direction of the business of the employer or a defined unit of the business of the employer. Such term also means an employee in possession of selective or specialized skills, learning, or abilities or customer contacts or customer information who has obtained such skills, learning, abilities, contacts, or information by reason of having worked for the employer."
11. O.C.G.A. § 13-8-51(8) (2011) (emphasis added).
12. As Justice Gobeil concurred in the judgment, *Blair* is physical precedent only.
13. 348 Ga. App. 298, 822 S.E.2d 606 (2018).
14. CSM Bakery Sols., LLC v. Debus, 1:16-CV-03732-TCB, 2017 U.S. Dist. LEXIS 193775 (N.D. Ga. Jan. 25, 2017).
15. *Id.* at *10.
16. *Id.* at *12.
17. *Id.* at *14-15.
18. *Id.* at *15.
19. *Id.* at *16.
20. *Id.* at *16-17.
21. *Id.* at *18.
22. *Id.* at *18-19.
23. *See, e.g.,* Ceramic & Metal Coatings Corp. v. Hizer, 242 Ga. App. 391, 393, 529 S.E.2d 160, 163 (2000) (contract overbroad in terms of territorial limitation and scope of prohibited activity).
24. *See, e.g.,* Wachovia Ins. Servs., Inc. v. Fallon, 299 Ga. App. 440, 682 S.E.2d 657, 660 (2009).
25. O.C.G.A. § 13-8-51(12) (2011).
26. O.C.G.A. § 13-8-51(11) (2011).
27. O.C.G.A. § 13-8-53(d) (2012).
28. Kennedy, 348 Ga. App. at 305.
29. 354 Ga. App. 289, 840 S.E.2d 765 (Mar. 10, 2020).
30. *Id.* at 289-90.
31. *Id.* at 294-95.
32. *Id.* at 295.
33. In *Carpetcare Multiservices, LLC v. Carle*, the trial court struck a non-compete that prohibited the contractor from providing services to any customer with whom he had contact while an employee but did not contain any territorial limitation. 347 Ga. App. 497, 819 S.E.2d 894 (2018). The trial court held that it could not write in a territory, and the employer did not appeal the ruling based the trial court's failure to write in a territory. *Id.* at n.1. The majority of the Court of Appeals of Georgia panel affirmed the trial court's ruling that this no-servicing covenant was unenforceable without a territory and did not address the trial court's decision not to reform the covenant. Justice Ray in dissent would have enforced the covenant without a territory and expressed his view that the trial court may have been authorized to write in a territory to cure any flaw and make the covenant reasonable. *Id.*
34. No. 1:15-CV-4309-TWT, 2016 U.S. Dist. LEXIS 181823 (N.D. Ga. Dec. 9, 2016).
35. *Id.* at *15.
36. *Id.* at *16-17.
37. *Id.* at *18 (citing Hamrick v. Kelley, 260 Ga. 307, 308 (1990)).
38. *Id.* at *19. *See also* Wind Logistics Prof'l, LLC v. Universal Truckload, Inc., No. 1:16-CV-00068, 2019 U.S. Dist. LEXIS 161720, at *26-27 (N.D. Ga. Sept. 23, 2019) (following *Lifebrite* and concluding that a court cannot add missing material terms to a non-compete).
39. Cunningham Lindsey U.S. LLC v. Box, No. 1:18-CV-4346-MHC, 2018 U.S. Dist. LEXIS 224774, at *17-18 (N.D. Ga. Oct. 23, 2018).
40. *Id.* at *19-20.
41. No. CV418-288, 2020 WL 2531622, at *9 (S.D. Ga. May 18, 2020).
42. *Id.* (citing PointeNorth Ins. Grp. v. Zander, No. 1:11-CV-3262-RWS, 2011 WL 4601028 (N.D. Ga. Sept. 30, 2011), in which Judge Story pared down a customer non-solicit which prohibited soliciting *and accepting* business and applied to *any* of the former employer's clients, to apply only to solicitation of those clients with whom the former employee had material contact during her employment).
43. Belt Power, LLC v. Reed, 354 Ga. App. 289, 294-95, 840 S.E.2d 765, 770 (Mar. 10, 2020).
44. *Id.* (emphasis supplied).
45. *Id.*
46. *Id. Belt Power* did not specifically address which reasonableness requirements in the statute apply to these types of covenants.
47. Kennedy v. The Shave Barber Co., LLC, 348 Ga. App. 298, 305, 822 S.E.2d 606, 612 (2018) (customer goodwill found to be sufficient).
48. *See* Novelis Corp. v. Smith, No. 1:16-CV-1557-ODE, 2017 U.S. Dist. LEXIS 222886 (N.D. Ga. Mar. 10, 2017) (enforcing worldwide non-compete where employee joined an affiliate of a competitor listed in the non-compete); NCR Corp. v. Manno, No. 3:12-CV-121-TCB, 2012 U.S. Dist. LEXIS 196750 (N.D. Ga. Oct. 26, 2012), motion for reconsideration granted on other grounds at 2012 U.S. Dist. LEXIS 198847 (enforcing non-compete which included a list of competing organizations and a territory).
49. *Compare*, Kennedy, 348 Ga. App. at 305-06 (finding that non-compete did not restrict her in any capacity), *with* ID Tech., LLC v. Hamilton, No. 1:14-CV-00594-TWT, 2014 U.S. Dist. LEXIS 198732, at *2 (N.D. Ga. Mar. 24, 2014) (denying injunction because, *inter alia*, "a total prohibition on Defendant working in any capacity with a competitor is unreasonable").
50. Kennedy, 348 Ga. App. at 308 (trial court balanced the equities and rejected stylist's claims that she would go bankrupt if her non-compete was enforced).
51. *Compare*, Belt Power, LLC v. Reed, 354 Ga. App. 289, 295-96, 840 S.E.2d 765, 770 (Mar. 10, 2020) (Mar. 10, 2020) (affirming trial court's decision to disregard Delaware choice of law provision), *with* Smart Profitability Sols., LLC v. Double Check Risk Sols., LLC, No. 1:18-CV-706-MHC, 2018 U.S. Dist. LEXIS 226645, at *33-36, motion for reconsideration denied at 2019 U.S. Dist. LEXIS 161115, at *40-42 (N.D. Ga. May 23, 2018) (enforcing non-disclosure covenant which is governed by Louisiana law as doing so does not violate Georgia's new public policy), *and* AWP, Inc. v. Henry, No. 1:20-cv-01625-SDG, 2020 U.S. Dist. LEXIS 145427, at *10-13 (N.D. Ga. July 17, 2020) (applying Ohio law, as doing so does not violate Georgia's new public policy).

GETTYIMAGES.COM/VEPAR5

Is Liberal Enforcement of Noncompetes Still Good Policy?

To prompt discussion about the economic impact of Georgia's noncompete law, this article discusses policy considerations and gives practical suggestions for how Georgia's noncompete law might be amended to effectively support employers without unnecessarily burdening employees.

BY BENJAMIN I. FINK

In 2011, the law in Georgia relating to enforcement of noncompetes and other restrictive covenants changed significantly as a result of the passage of the statute that is commonly referred to as the "Restrictive Covenant Act" or "RCA."[1] Prior to that time, the Georgia Constitution prohibited contracts that had the effect of or were intended to defeat or lessen competition.[2] That prohibition resulted in a long line of case law in Georgia that was hostile to enforcement of restrictive covenants, particularly in the employment context.

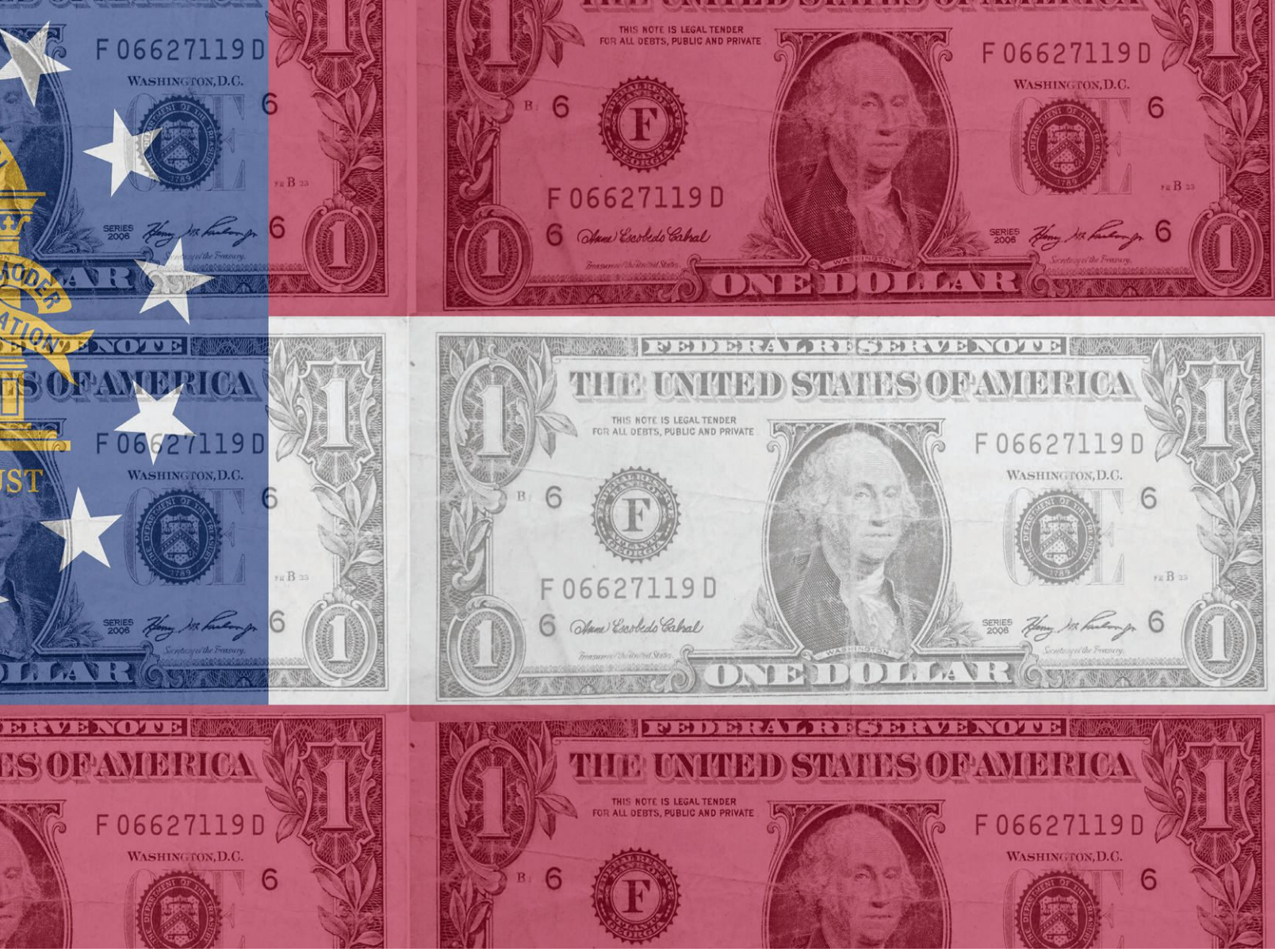
The RCA made it much easier for companies to enforce noncompetes, especially against former employees. In passing the law, the General Assembly found that "reasonable restrictive covenants contained in employment and commercial contracts serve the legitimate purpose of protecting legitimate business interests and creating an environment that is favorable to attracting commercial enterprises in Georgia and keeping existing businesses within the state."[3]

It is undoubtedly true that more liberal enforcement of noncompetes helps many employers; however, there is little evidence that proponents of the RCA considered the negative effects the law could have on Georgia's economy as a whole. For example, while the law was being debated in the Legislature, a few members of the public, including this author, called upon Georgia lawmakers to consider studies that suggest greater enforcement of noncompetes can hinder overall economic development and entrepreneurial activity.[4] These recommendations for further research and analysis were largely ignored.

Much has changed in the national noncompete landscape since 2011 and many of the policies commonly cited as the basis for strict enforcement of noncompetes are now being heavily scrutinized by state legislatures.[5] The massive job losses resulting from the coronavirus pandemic may accelerate this trend, especially with respect to lower wage workers.

In October of 2016, in response to a report released by the U.S. Department of Treasury, President Obama issued a call to action on "unnecessary" noncompete agreements.[6] This call to action received support from elected officials in a few states, as well as from prominent social scientists who study noncompetes.[7] The Trump administration has continued to scrutinize noncompete agreements and various bills have been introduced by Congress seeking to curtail the use of noncompetes.[8]

In addition, the Federal Trade Commission (FTC) has been pulled into the national reassessment of noncompetes.[9]



Earlier this year, the FTC held a public workshop on possible rulemaking to determine whether there is sufficient legal and empirical support to promulgate a rule restricting the use of noncompetes.[10]

These developments demonstrate a growing national interest in reassessing noncompetes. This interest is perhaps partially fueled by a number of economic and social studies that support some of the cautionary pleas made by this author in 2011. Considering the recent national trend toward reevaluating noncompetes, as well as the introduction of new empirical data related to noncompetes, the time may be ripe for Georgia lawmakers to revisit Georgia's noncompete law and its impact on economic development in Georgia. To prompt discussion about the economic impact of Georgia's noncompete law, this article discusses some of these policy considerations. Additionally, this article gives practical suggestions for how Georgia's noncompete law might be amended to effectively support employers without unnecessarily burdening employees.

Background

In most states, except those most hostile to noncompetes, the law typically allows for the enforcement of noncompetes as long as they are reasonable, requiring courts to balance the interests of employers, employees and society as a whole in making a reasonableness determination.[11] This approach typically provides the courts with wide discretion in determining on a case-by-case basis whether a noncompete should be enforced, allowing increased flexibility in the law. Following enactment of the RCA, Georgia follows this approach.

However, some scholars have argued that this reasonableness test for enforceability leads to inconsistency in enforcement,[12] as well as the misallocation of human resources, reduced economic growth, innovation and even employee performance.[13] Further, some scholars have argued that a legal regime in which noncompetes are strictly enforced is inconsistent with the current state of the economy and the realities of the current employment model in the United States, including the shift from employers promising long-term job stability in exchange for employee loyalty to a model comprised of job instability and increased employee mobility.[14] Noncompetes "may also serve anticompetitive ends, including limiting wage growth by restraining labor-market competition from product-market competitors, retarding product-market competition by reduc-

ing information flows to competitors and preempting future competition from departing employees."[15]

The Policy Considerations

The Use of Noncompetes to Protect Trade Secrets

One of the primary arguments for the use of noncompetes in the employment context by employers is that they are necessary to prevent unfair competition through an employee's misappropriation of confidential information, trade secrets or other key competitive knowledge learned through employment or as a result of training.[16] While trade secrets statutes provide for injunctive relief for actual or threatened misappropriation of trade secrets, as well as potential damages for actual misappropriation, this type of protection may sometimes be insufficient for employers as the damage may already be done by the time they are able to obtain an injunction.[17] There is certainly a valid concern that neither trade secret law nor nondisclosure agreements provide the level of protection offered by noncompetes. Noncompetes can prevent an employee from taking a role with a competitor that would put the former employer's trade secrets and other confidential business information at risk of being used or disclosed. On the other hand, based on studies suggesting the availability of other legal mechanisms such as nondisclosure agreements, confidentiality agreements and trade secrets statutes, as well as the inability of noncompetes to adequately protect trade secrets without overreaching to cover non-protectable information and without overly restricting job mobility, policy-makers should at least consider whether noncompetes are the most appropriate way in which to protect an employer's trade secrets from former employees' improper use or disclosure.[18]

Researchers at MIT and Harvard have concluded that states that enforce noncompetes tend to experience lower venture capital investment than states that proscribe enforcement, and that the strict enforcement of noncompetes drives away some of the "best and brightest."

What Impact do Noncompetes have on Economic Development?

Proponents of noncompetes argue that businesses are less likely to open offices or locate in jurisdictions where courts frequently strike down noncompetes and that this stems from concerns about their ability to restrict their employees from leaving to join competitors. Yet, some studies suggest that strict enforcement of noncompetes may not be in the best interest of all businesses or overall economic development.[19] Researchers at MIT and Harvard have concluded that states that enforce noncompetes tend to experience lower venture capital investment than states that proscribe enforcement,[20] and that the strict enforcement of noncompetes drives away some of the "best and brightest."[21] Thus, highly accomplished executives may be more likely to locate in states that do not favor enforcement of noncompetes as they may believe they can maximize their compensation in those states. In addition, several studies suggest that enforcing noncompetes may inhibit entrepreneurs from starting new businesses.[22] These studies at least suggest that the historical rationale for noncompete enforcement should be reexamined.

What Impact Do Noncompetes Have on Innovation?

Proponents of noncompetes have also traditionally argued that they give businesses an incentive to engage in costly research and development activities, which lead to innovations in products

and services, thereby making businesses more competitive.[23] Without such protections, employers may be less likely to spend money on research and development because employees could more easily walk away from the business and take their knowledge to a competing business.

Conversely, one study has found that stricter enforcement of noncompetes reduces research and development spending and capital expenditures per employee.[24] Other studies conclude that the enforcement of noncompetes may actually reduce technological advancement, innovation and economic growth for businesses due to the lack of information spillover created by employee mobility.[25] Further, one scholar has concluded that the use of noncompetes as protection for intellectual property rights such as trade secrets may inhibit downstream innovation because former employees may be sufficiently afraid of becoming "enmeshed in litigation" as a result of using such information to engage in competitive activities, such as creating a competing enterprise.[26]

What Impact Do Noncompetes Have on Employee Performance?

A newer argument against the strict enforcement of noncompetes in the employment context is that such enforcement stifles employee performance. In a recent study, researchers found that subjects in simulated noncompete conditions showed significantly less motivation in their jobs and got worse results on effort-based tests. They conclude that restrictions on an employee's future employment not only dim the employee's later employment prospects, but also "decrease their perceived ownership of their jobs, sapping their desire to exert themselves and develop their skills."[27]

There is some evidence to suggest that restricted employees' negative perceptions of their future market opportunities may be justified. According to another recent study, employees who work in states where noncompetes are enforced generally accumulate less income than employees who live in states where noncompetes are not enforced.[28] Scholars suggest that this is because the restricted employees are not free to pursue higher-paying opportunities when they come along.[29] Similarly, some studies suggest that in areas where noncompetes are regularly enforced, even employees who are not bound by noncompetes see reduced wages and employment opportunities.[30]

Suggestions for Reforming Georgia's Noncompete Law

Given the state of the research, the question that should be asked is whether the law surrounding noncompete agreements needs wholesale change or whether the occasional abuse of noncompetes is what really creates the problems (like unpaid interns and minimum wage sandwich makers). While abuses certainly exist and should be curbed, the studies referenced above suggest that Georgia's noncompete law could be reformed to enhance the benefits of noncompetes while reducing the burden they place on Georgia's employees. The reformation could include at least four major components.

First, Georgia should consider expressly banning noncompetes for low-wage workers. Georgia's current noncompete law does not clearly delineate which employees may be subjected to a noncompete.[31] While the drafters may not have intended for the statute to allow noncompetes against low-wage employees, there is enough room in the statute's language to argue that these employees may be restricted by a noncompete in certain circumstances. However, low-wage workers typically are not privy to the type of information noncompetes are meant to protect, and even if they are, there are other less burdensome legal mechanisms employers may use to protect their information. This rationale prompted several states to ban noncompetes for low-wage workers in 2019.[32] Georgia should consider following suit.

Second, Georgia should consider requiring employers to give employees and job candidates advance notice that they will be asked to sign a noncompete. Requiring employers to give employees advance notice would prevent the common scenario of new employees hastily signing a noncompete on their first day of work and would give employees a chance to consider the implications of signing a noncompete before accepting employment.[33] Relatedly, consideration should be given to offering existing employees something more than continued employment as consideration in support of a noncompete. This consideration might include a one-time payment, equity incentives, additional paid time off or something else of value.

Third, Georgia should consider adopting a relatively new approach, called "purple penciling" by some experts,[34] when evaluating the enforceability of noncompetes. The purple pencil approach is a combination of a judicial modification approach, in which courts may "modify" a noncompete by rewriting its language, and a red pencil approach, in which courts simply void an overly broad noncompete. Under the purple pencil approach, courts must void a noncompete entirely unless the document shows an unambiguous intent to draft narrow restrictions on the employee, in which case, a court may modify the noncompete.

Finally, Georgia should consider expressly empowering courts to craft broad remedial measures when an employee intentionally violates other legal obligations, such as a non-disclosure covenant or customer non-solicitation covenant, including, when appropriate, prohibiting the employee from working for a competitor for a limited period of time. Some have referred to this as a "springing" or "time-out" noncompete.[35] A springing noncompete is one that an employee is not initially subjected to by an employer, but may be imposed on an employee by a court if the employee violates another less restrictive covenant. By allowing courts to impose springing noncompetes, Georgia employers will be encouraged to use less restrictive covenants with the assurance that courts can impose more substantial protective remedies on dishonest and non-compliant employees.

Conclusion

The question of the extent to which noncompetes should be enforceable in the employment context appears to have no clear answer. On the one hand, em-

ployers have a very legitimate interest in protecting their business assets from unfair competition by former employees and their new employers. On the other, employees, and the greater economy as a whole, have a legitimate interest in having the ability to change jobs and not being chained to a specific job as a result of their knowledge of information that may be used in a new position. The public also has a legitimate interest in a competitive marketplace. Accordingly, as a starting point, Georgia lawmakers should consider taking steps to reduce the use of noncompetes against low-wage employees, to ensure employees are aware they may be asked to sign a noncompete and to encourage employers to use less restrictive covenants by empowering courts to more effectively deal with over broad noncompetes and, on the other hand, with dishonest or non-compliant employees. ●

Thank you to Lauren Frisch and Ben Perkins, associates at Berman Fink Van Horn, for their assistance with this article.

Benjamin I. Fink is a shareholder in the Atlanta law firm Berman Fink Van Horn P.C. where his practice focuses on noncompete, trade secret and other competition-related disputes. In recognition of his thought leadership in the trade secrets arena, he was invited to serve on the Sedona Conference drafting team for Principles/Best Practices Commentary on Protecting Trade Secrets in Litigation as part of Working Group 12 on Trade Secrets.

Endnotes

1. HB 30, 151st Leg., Reg. Sess. §1 (Ga. 2011).
2. Ga. Const. art. III, § VI, para. V(c) (*amended by* Ga. Const. art. III, § VI, para. V(c)(1)-(3)).
3. HB 173, 150th Leg., Reg. Sess. §3 (Ga. 2009).
4. Ga. State Univ. Law Review, *Contracts HB 30,* 28 Ga. St. U. L. Rev. 21, 29 (2012).
5. Over the last few years, Massachusetts, Washington, Maryland and Oregon have imposed new limits on employers' use of non-competes. Bills to modify non-compete laws have been introduced in over 30 states, with 37 bills pending in 18 states (plus Washington D.C.). Nineteen of those states have enacted legislation modifying their preexisting non-compete laws, some strengthening non-competes, but most making it harder to enforce them. *See The Changing Landscape of Trade Secrets Laws and Noncompete Laws Around the Country*, https://www.faircompetitionlaw.com/changing-landscape-oftrade-secrets-laws-and-noncompete-laws/.
6. *See* Office of Economic Policy, U.S. Department of Treasury, *Non-compete Contracts: Economic Effects an, Policy Implications* (March 2016); White House, Office of the Press Secretary, FACT SHEET: The Obama Administration Announces New Steps to Spur Competition in the Labor Market and Accelerate Wage Growth (October 25, 2016).
7. *See id. See also* Olav Sorenson & Matthew Marx, *Restricting Employment Restrictions* (November 16, 2016), http://insights.som.yale.edu/insights/restricting-employment-restrictions.
8. Evan Starr, *The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements: A Brief Review of the Theory, Evidence, and Recent Reform Efforts*, Econ. Innovation Group, 2-3 (Feb. 2019), https://eig.org/wp-content/uploads/2019/02/Non-Competes-Brief.pdf; David M. Walsh & Colin A. Thakkar, *A Renewed Attempt in Congress to Eliminate Non-Compete Agreements*, The Nat'l L. Rev. (Nov. 24, 2019); Workforce Mobility Act of 2020, H.R. 5710, 116th Cong. (2020).
9. Russell Beck & Erika Hahn, *Noncompete Misconceptions May Be Inhibiting Reform*, Law 360 (Dec. 17, 2019), https://www.law360.com/articles/1228569/noncompete-misconceptions-may-be-inhibiting-reform.
10. *FTC to Hold Workshop on Non-Compete Clauses Used in Employment Contracts*, Fed. Trade Commission (Dec. 5, 2019), https://www.ftc.gov/news-events/press-releases/2019/12/ftc-hold-workshop-non-compete-clauses-used-employment-contracts. At the workshop, the FTC asked stakeholders what effect noncompetes have on the labor market, how businesses justify them, and whether the federal government should address "potential harms" not addressed by current law and regulation.
11. The 1711 case of *Mitchel v. Reynolds*, 24 Eng. Rep. 347 (Q.B. 1711) established the modern reasonableness framework. *See* Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800–1920*, 52 Hastings L.J. 441, 453–54 (2001); Alger v. Thacher, 36 Mass. 51, 53 (1837).
12. Daniel P. O'Gorman, *Contract Theory and Some Realism About Employee Covenant Not to Compete Cases*, 65 SMU L. Rev. 145, 185 (2012).
13. *See* Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 Am. Bus. L.J. 107, 168-69 (2008); Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751, 761 (2011); Katherine V.W. Stone, *Knowledge at Work Disputes Over the Ownership of Human Capital in the Changing Workplace*, 34 Conn. L. Rev. 721, 723 (2002); Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. Rev. 575, 578 (June 1999); On Amir & Orly Lobel, *Driving Performance: A Growth Theory of Noncompete Law*, 16 Stan. Tech. L. Rev. 833, 836 (2013).
14. *See* Garrison & Wendt, *supra* note 13, at 166-167.
15. Starr, Evan, et al., *Noncompetes in the U.S. Labor Force*, U. of Mich. Law & Econ. Research Paper No. 18-013 (May 7, 2020).
16. Garrison & Wendt, *supra* note 13, at 166-167.
17. *See* Randy Burton, et al., *The Sound of Inevitability: The Doctrine of Inevitable Disclosure of Trade Secrets Comes to Texas*, 44 SPG Tex. J. Bus. L. 103, 123 (2012).

18. *See* Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 Ariz. L. Rev. 939, 980 (2012); Garrison & Wendt, *supra* note 13, at 116, 178.
19. *See* April Franco & Matthew Mitchell, *Covenants Not to Compete, Labor Mobility and Industry Dynamics*, 44 – 46 (Mar. 21, 2005), http://www.lse.ac.uk/fmg/research/RICAFE/pdf/Franco_April.pdf; *see also* Richard A. Booth, *Hurd on the Street?* The National Law Journal (Oct. 25, 2010) (California law against non-competes is good for business, particularly the technology business, as it seemed to have led to the rise of Silicon Valley and increased innovation by allowing information sharing that would otherwise not have been possible; further, without the restrictions of non-competes, employees are free to leave less productive companies whenever they so choose, which helps to create a more efficient marketplace and allows the best employees to be hired by the best businesses); Matt Marx & Lee Fleming, *Non-compete Agreements: Barriers to Entry... and Exit?*, 12 Innovation Policy and the Economy 39 – 64 (2011), http://funginstitute.berkeley.edu/sites/default/files/Non-compete%20agreements%20barriers%20to%20exit.pdf; Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. Rev. 575, 578 (June 1999); John Krafcik, *A Little-Known California Law is Silicon Valley's Secret Weapon*, p. 6 (2017), http://www.vox.com/new-money/2017/2/13/14580874/google-self-driving-noncompetes.
20. Sampsa Samila & Olav Sorenson, *Non-compete Covenants: Incentives to Innovate or Impediments to Growth,* Danish Research Unit for Industrial Dynamics Working Paper No. 10-02, (2011), https://pdfs.semanticscholar.org/609e/74a33834304a4dcf39c2321f601c37935334.pdf?_ga=2.101460673.1105628633.1592400522-1801095256.1592400522.
21. *See* Marx & Fleming *supra* note 19, at 55; *see also* Matt Marx, et al., *Regional Disadvantage? Non-compete Agreements and Brain Drain*, p. 19 (2012), https://faculty.insead.edu/jasjit-singh/documents/marx_singh_fleming_regional-disadvantage.pdf; Matt Marx, et al., *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55 Mgmt. Sci. 875(2009) (finding that "[t]he job mobility of inventors in Michigan fell 8.1% following the policy reversal compared to inventors in other states that continued to proscribe non-competes, and these effects were amplified for those with particular characteristics"); Matt Marx, et.al., *Noncompetes and Inventor Mobility: Specialists, Stars, and the Michigan Experiment*, Working Paper No. 07-042 (2007), http://www.hbs.edu/faculty/Publication%20Files/07-042.pdf.
22. Starr, *supra* note 8.
23. Garrison & Wendt, *supra* note 13, at 168.
24. Mark J. Germaise, *Ties that Truly Bind: Non-Competition Agreements, Executive Compensation and Firm Investment* (2009), http://personal.anderson.ucla.edu/mark.garmaise/noncomp7.pdf.
25. Garrison & Wendt, *supra* note 13 at 169-70; *see also* Moffat, *supra* note 18, at 979; Anna Lee Saxenian, *Regional Advantage: Culture and Competition in Silicon Valley and Route 128*, Cambridge, Massachusetts: Harvard University Press (1994).
26. Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Non-Competition Agreements*, 52 Wm. & Mary L. Rev. 873, 911 and n. 150 (2011). While there is no dearth of studies suggesting non-competes have the potential to stifle innovation, some authors suggest that the studies underlying this notion, like the comparison between Silicon Valley and Massachusetts, are not as impactful as many believe. *See, e.g.*, Jonathan Barnett & Ted Sichelman, *The Case for Non-Competes*, U. Chi. L. Rev. (forthcoming 2020).
27. On Amir & Orly Lobel, *How Noncompetes Stifle Performance*, Harvard Bus. Rev., Jan.–Feb. 2014, at 26.
28. Natarajan Balasubramanian, et al., *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers*, 28-29 (U.S. Census Bureau Ctr. for Econ. Studies, Paper No. CES-WP-17-09, 2018), https://ssrn.com/abstract=2905782.
29. Starr, *supra* note 8. Starr also concludes that because non-competes diminish employee wages and mobility and reduce new firm entry into the market, companies located in states that enforce non-competes are attractive acquisition targets. Starr also references studies that suggest non-competes raise hiring costs for firms that hope to acquire employees/other companies in states that enforce non-competes. *Id.* at 12.
30. Evan Starr, et al., *Mobility Constraint Externalities* 30 Org. Sci. 869 (2019). Yet, another recent study suggests that reducing use of non-competes, at least among low-wage employees, can increase employees' wages and mobility. Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Non-Compete Agreements* (December 9, 2019), https://ssrn.com/abstract=3452240 or http://dx.doi.org/10.2139/ssrn.3452240. *Compare Study Finds Noncompete Clauses Affect How Employees Behave, To Benefit Of Employers*, https://news.ku.edu/2019/03/25/study-finds-non-compete-clauses-affect-how-employees-behave-benefit-employers.
31. *See* O.C.G.A. § 13-8-53(a); *see also* Blair v. Pantera Enters., Inc., 394 Ga. App. 846, 824 S.E.2d 711 (2019) (backhoe operator not an employee subject to a non-compete under the RCA); Kennedy v. Shave Barber Co., LLC, 348 Ga. App. 298, 822 S.E.2d 606 (Ga. Ct. App. 2018) (hair stylist is a key employee under the RCA); CSM Bakery Sols., LLC v. Debus, 1:16-CV-03723-TCB, 2017 WL 2903354 (N.D. Ga. Jan. 25, 2017) (non-compete not permitted against bakery manufacturer sales representative).
32. Benjamin I. Fink, *Employer Alert: Non-Competes Are Under Attack in Certain States*, BFVLaw.com: Georgia Non-Compete & Trade Secrets (Aug. 28, 2019), https://www.bfvlaw.com/employer-alert-non-competes-are-under-attack-in-certain-states/.
33. When employees are given advance notice that a non-compete will be required non-competes may have positive effects such as higher wages, more training, information and job satisfaction. *See* Starr, *supra* note 15, p. 15.
34. *See, e.g.*, Beck & Hahn, *supra* note 9.
35. *Id.*