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LETTER
NONCOMPETE NEWS

Noncompete News: Georgia's Restrictive Covenants Act Effective May 11, 2011

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On May 11, 2011, Governor Deal signed into law House Bill 30. House Bill 30 was introduced primarily to clarify when the Restrictive Covenants Act ("RCA") would be effective.

As discussed in our prior Noncompete News alerts (see December and January issues), initially the RCA was thought to become effective on November 3, 2010. Then, commentators argued it would become effective on January 1, 2011 and, then, not at all. Thus, House Bill 30 was signed into law "to remove any uncertainty by substantially reenacting the substantive provisions of [the RCA], but the enactment of this Act should not be taken as evidence of a legislative determination that [the RCA] was in fact invalid."

To be clear, pre-existing Georgia law applies to all Georgia restrictive covenant agreements entered into **prior to** November 3, 2010. The RCA applies to all Georgia restrictive covenant agreements entered into **after** May 11, 2011, and there is certain to be litigation as to which law (pre-existing Georgia law or the RCA) will apply for those agreements entered into between November 3, 2010 and May 10, 2011.

Below is a refresher on the primary differences between pre-existing Georgia law and the RCA.

Prior Georgia Law

As discussed in prior *Non-Compete News* articles, Georgia was a "no-blue pencil" state. In essence, what that means (and what that still means for all Georgia restrictive covenants employment agreements entered into prior to November 2, 2010) is that a court is not allowed to modify the language used in the agreement. Because the agreement lives or dies on its face, drafting an enforceable Georgia restrictive covenant required practitioners to carefully study existing Georgia common law.

A true non-compete provision had to be very narrowly defined in terms of time, territory, and scope of activity. Often, non-compete provisions failed because the defined territory reached further than the territory in which the employee performed services or it was not sufficiently defined to understand its breath as of the time the parties entered into the agreement. Alternatively, a non-compete failed because the provision attempted to restrict the employee from performing generally competitive services, rather than those services that the employee performed on behalf of the employer.

Similarly, a non-solicitation of customers provision failed because it was not narrowly drafted to apply to those customers with whom the employee had business contact, because the provision restricted the employee from soliciting all types of business rather than just the business provided by the employer, because it prohibited the acceptance of business rather than just the active solicitation of business, or because it existed in an agreement that contained an unenforceable non-compete provision. Finally, a non-disclosure provision failed if it did not contain a temporal restriction.

The Restrictive Covenants Act

A. Modification of Overbroad Provisions

Under the new RCA, the court is expressly authorized to "modify" an overbroad restrictive covenant provision. Under the RCA, "modification" is defined as "severing or removing" a part of a restrictive covenant that would otherwise make the covenant unenforceable. Accordingly, under the definition, a court is allowed to strike out or remove language that renders the restrictive covenant otherwise unenforceable, but it arguably (we are suspecting this issue will be litigated) cannot rewrite or otherwise add to the language of a non-compete. This constitutes the primary change to pre-existing Georgia law, as Section 13-8-54 of the RCA now provides that a court "may modify" an otherwise unenforceable restrictive covenant.

B. No Temporal Restriction for Non-disclosure Provision

Pursuant to Section 13-8-53(e) of the RCA, a non-disclosure provision relating to confidential information no longer has to have a temporal restriction in order to be enforceable. Further, the RCA defines confidential information. Therefore, the drafter of a restrictive covenant going forward can rely on the definition in the RCA to ensure that the agreement complies with the RCA.

C. Broadening a Non-solicitation of Customers Provision

As discussed above, under pre-existing Georgia law, a non-solicitation of customers provision needed to be narrowly defined to include only those customers with whom the employee had actual contact (at least as to those non-solicitation of customers provisions that did not have a narrowly-defined territorial restriction). Under the RCA, the definition of "material contact" now allows a non-solicit to include not only those customers with whom the employee had actual contact, but also those customers: 1) whose dealings with the employer the employee coordinated or supervised; 2) about whom the employee obtained confidential information while employed by the employer; or 3) about which the employee received compensation, commissions, or earnings during the two years prior to the employee's termination. In addition to the broader definition of "material contact," the non-solicitation of customers provision need not expressly define the types of products or services considered to be competitive in order for the non-solicit of customers to be enforceable.

D. Non-compete Agreements Apply to a More Defined Group of Employees

Under pre-existing Georgia law, an employer can enter into a non-compete agreement with any employee, whether that employee is a janitor, salesman, or CEO. Under the RCA, a non-compete provision may only be enforced against an employee who: 1) customarily and regularly solicits customers or prospective customers; 2) customarily and regularly engages in making sales; 3) has a primary duty of managing a company, or one of its departments or subdivisions, directs the work of two or more employees and has the authority to hire or fire other employees; or 4) performs the duties of a "key employee" or a "professional" as defined by the RCA. As a practical matter, however,

true non-compete provisions have, in the past, rarely been enforced against other than the above-identified types of employees. Indeed, restrictive covenant disputes primarily involve sales employees and their employers. Nevertheless, under the RCA, a large subset of Georgia employees cannot be subject to a true post-term non-compete provision.

Bottom Line

Employers who employ Georgia employees may want to enter into new restrictive covenant agreements, if they want to broaden the prohibitions they have under their current agreements. Georgia practitioners will no longer be able to look to the face of most agreements drafted after May 11, 2011, in order to determine their enforceability. Rather, to determine the enforceability of restrictive covenants in Georgia going forward, employers and employees alike likely will have to engage the court system in order to determine with certainty whether a restrictive covenant will be enforced.

If you have any questions regarding the new law or non-compete agreements, please contact Jeff Mokotoff, jmokotoff@fordharrison.com, the author of this article and editor of the *Non-Compete News*, or the Ford & Harrison attorney with whom you usually work.