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LEGAL ALERT

Georgia's New Non-Compete Statute – What a Long Strange Trip It's Been

On May 11, 2011, Georgia Governor Nathan Deal signed House Bill 30, Georgia's new restrictive covenants statute. The signing by Governor Deal brings to a close a process that is accurately summarized by the words of the Grateful Dead – "what a long strange trip it's been!"

The upshot of the new legislation is that a new day has dawned in Georgia for restrictive covenants signed on or after May 11, 2011. The new law has no impact on non-competes and other restrictive covenants signed before May 11, 2011 (with a caveat – there is an argument that the first go around at the legislation would apply to agreements signed on or after January 2, 2011, but that very debatable issue is explained below).

The new statutory framework is found in O.C.G.A. Section 13-8-50. While there are numerous benefits to the statute, the most notable is that Georgia judges now have the ability to modify non-compete and other restrictive covenant provisions if they are overbroad as written. Under the common law (which still governs covenants signed prior to the effective date of the new legislation), Georgia judges did not have any meaningful wiggle room when asked to enforce a restrictive covenant in the employment context. In other words, if a non-compete or non-solicit provision was overbroad in any respect, it was simply not enforced.

What Should Employers Do?

It is now time for businesses with employees in Georgia to dust off their restrictive covenant agreements. Georgia law does not require "additional consideration" to support a new agreement signed by a current employee. So if there is any question as to whether an agreement signed by an employee is valid or whether it really provides the company with the protection it needs, the time is ripe to solidify the situation with a new agreement.

But when drafting new agreements, businesses should be careful about getting too greedy. The law does not require judges to modify overbroad covenants; rather, any needed modification is left to the discretion of the judges. Given the strict scrutiny with which Georgia judges have been reviewing non-competes for decades, only time will tell how willing they will be to engage in modification efforts.

History Behind The New Law

For those interested in more detail, the following recaps the winding history that culminated in Governor Deal's signing of House Bill 30 on May 11, 2011.

Approximately 20 years ago, the Georgia legislature passed legislation designed to govern the enforcement of restrictive covenants. However, in 1991, the Georgia Supreme Court ruled that the legislation was unconstitutional. The Supreme Court's ruling essentially meant that a constitutional amendment was needed because of the Georgia Constitution's general anti-restraint of trade prohibition.

Fast forwarding almost 20 years, the Georgia legislature teed it up differently. This time, an underlying statutory framework was passed that would go into effect if Georgia voters approved a constitutional amendment. This amendment appeared on the ballot on November 2, 2010, and read as follows: "Shall the Constitution of Georgia be amended so as to make Georgia more economically competitive by authorizing legislation to uphold reasonable competitive agreements?" Needing only a majority of voters to vote "yes," the amendment passed overwhelmingly with nearly 68% of the votes.

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Because the underlying statutory framework (House Bill 173) stated that it would "become effective on the day following the ratification at the time of the 2010 general election of an amendment to the Constitution of Georgia," everyone thought that the legislation went into effect on November 3, 2010 and would apply to agreements signed on or after that date. However, constitutional scholars soon pointed out a potential flaw – while House Bill 173 had an effective date of November 3, 2010, there was another piece of legislation that accompanied HB 173. This other piece was House Resolution 178, which contained the resolution proposing the amendment as well as the amendment itself. Notably, HR 178 did not contain anything about an effective date.

This is where is got interesting. According to Article X, Section 1, Paragraph 6 of the Georgia Constitution (entitled "Effective date of amendments or of a new Constitution"): "**Unless the amendment . . . itself or the resolution proposing the amendment . . . shall provide otherwise**, an amendment to this Constitution . . . shall become effective on the first day of January following its ratification." (Emphasis Added). Since neither the text of Amendment One, nor the resolution proposing it (HR 178) provided an effective date, the argument followed that the Amendment did not become became effective until January 2, 2011. Thus, since HB 173 had an effective date prior to the effective date of the Amendment, some argue that HB 173 can never be effective. Others argue that it was effective January 2, 2011.

While not conceding that HB 173 was never effective, Georgia legislators proposed a "fix." In an attempt to "remove any such uncertainty," House Bill 30 was introduced in January of 2011 with the goal of eliminating a constitutional challenge and making the Restrictive Covenant Act effective upon the signature of the Governor. House Bill 30 cleared its first hurdle on February 22, 2011, receiving approval from Georgia's House of Representative. It then moved to the Senate where it took almost two months to come to a vote. As the legislative session was nearing its close, the Senate passed House Bill 30 on April 12, 2011, but only after inserting an unrelated amendment. Late in the evening on April 14, 2011 – the last night of the session – the House rejected the amendment, sending it again back to the Senate. At 11:21 p.m. that night, the Senate "receded" the amendment. That meant that House Bill 30 as originally passed by the House in February had been approved with only minutes to spare.

On April 21, 2011, House Bill 30 was sent to Georgia's Governor, Nathan Deal, who eventually signed the legislation on May 11, 2011. Thus, readers can now appreciate the Grateful Dead "what a long strange trip it's been" lead in to this Alert.

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