New Noncompete Law Changed: How Will It Affect You in Georgia?

In the November 2, 2010 general election, Georgia voters approved an amendment to the Georgia Constitution that goes into effect as of November 3, 2010. With the approval of Amendment One, House Bill 173 ("H.B. 173") is officially enacted. H.B. 173 brings a significant change to the drafting and enforcement of restrictive covenants, including those within employment agreements (non-compete agreements). Rather than being limited by existing case precedent, Georgia courts will now have significantly more latitude in how these agreements may be enforced. Consequently, employers should have an easier time having such restrictions enforced. The time is ripe for employers to review their existing employment agreements and consider revisions that are consistent with the new law.

In the run-up to the November 2, 2010 election, H.B. 173 was the subject of vigorous debate between employers, employee organizations, and attorneys. The new law imposes a radical change in the manner in which employment agreements will be reviewed and enforced by the Georgia courts. Georgia has typically been viewed as somewhat hostile towards the enforcement of non-compete agreements. Of the 47 states that allow restrictive covenants in employment agreements, Georgia was one of only four states that did not permit any form of judicial modification of a covenant that may have overstepped the limitations imposed under the Georgia Constitution. Under prior law, Georgia employers were significantly limited in the duration, scope of prohibited activities and geographic areas in which any post-employment covenants would be enforced. Georgia courts implied a strict scrutiny standard of review in determining their reasonableness. If the covenants were found to be unlawful, they were stricken in their entirety. **Under the new law, Georgia courts will now be allowed to modify ("blue-pencil") restrictive covenants that may be overly broad**.

Under the terms of H.B. 173 (now codified at O.C.G.A. §13-8-50, *et seq*.), any previous uncertainties in how courts would receive and review a restrictive covenant have potentially been removed, although new issues may now be injected into the analysis. The new law guides employers, employees, and the courts on how these provisions should be interpreted and enforced. One of the most significant aspects of the new law is the provision that allows courts to "blue-pencil" an otherwise overly-broad restrictive covenant, thereby making it enforceable. Under prior law, if any portion of a non-compete in an employment agreement was held to be invalid, the entire covenant would be stricken. Under the new Georgia law, a court is permitted to uphold and enforce overly broad covenants by either removing the offensive provision or enforcing it to the extent it may be reasonable.

Application of the new law has some limitations. The statute is written only to apply to employment contracts for executive employees, employees in possession of important confidential information, or employees with specialized skills, knowledge, customer contacts or information. The new law provides little direction on how these categories of employment are to be defined. Consequently, it will still be incumbent upon the courts not only to review and possibly modify restrictive covenants, but also to make a threshold determination as to whether blue-penciling is permitted based upon the employee's position.

Adopting what was widely recognized as a permissible time limit of restrictive covenants under old law, H.B. 173 states that employment covenants of two years or less are presumed to be reasonable, while covenants extending more than two years in duration are presumptively unreasonable. The new law also attempts to define an employer's "legitimate business interest" that may be protected to include, without limitation, trade secrets, valuable confidential information, substantial relationships with customers and vendors, customer good will, and any extraordinary or specialized training received by the employee. Once again, each of these terms will likely be the subject of some dispute before the courts.

The new law also provides some guidance with respect to covenants limiting solicitation and the disclosure of information following employment. As with non-compete agreements, non-solicitation and non-disclosure provisions may be judicially modified when necessary. Non-solicitation provisions are subject to a somewhat broad definition of "material contact" with a customer before coverage is triggered. Additionally, non-solicitation provisions may be enforced in the absence of a geographic scope. Non-disclosure provisions need not have a time limit, and protections may remain in place as long as the information remains confidential or a trade secret. "Confidential information" is defined to include information that relates to an employer's business that has value and is not known to competitors but is disclosed to the employee based upon the employment relationship.

H.B. 173 provides sweeping changes to Georgia's approach to restrictive covenants. The law applies only to agreements entered into on or after November 3, 2010. Thus, if an employer wishes to reap the benefit of the new statute's protections and guidance, new agreements with current employees must be executed.

If you have any questions about Amendment One and how it will affect your business, please contact:

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