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LETTER
NONCOMPETE NEWS

Noncompete News: HB 173: Potential Sea Change to Georgia's Noncompete Law

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On April 29, 2009, Governor Sonny Perdue signed House Bill 173 (HB 173), to amend Georgia law relating to the enforcement of employment contracts that restrict or prohibit competition. HB 173 becomes effective only if Georgia's voting public passes a corresponding amendment to the Georgia Constitution, allowing for the Georgia legislature to propound the new law. ***Current Law*** As readers of the Noncompete News are aware, one of the most unique aspects of Georgia noncompete law is the Courts' refusal to "blue-pencil" an overbroad restrictive covenant. That is, if as drafted the provision is overbroad, courts cannot modify it in order to make it enforceable and the provision will be void on its face. Georgia Courts have attempted to provide "bright lines" to drafters of Georgia restrictive covenants (noncompete, nonsolicit of customers, nonsolicit of employees, and nondisclosure provisions). While Georgia Courts have taken a narrow approach to enforcing restrictive covenants, drafters of restrictive covenants understand that Georgia courts will enforce thoughtfully-crafted agreements. ***Potential Impact of HB 173*** Enacted in response to Georgia's strict rules and, in particular, the "no blue-pencil" aspect of Georgia law, HB 173 provides statutory guidance for interpreting restrictive covenant agreements. Among other things, HB 173 defines terms frequently used in restrictive covenant agreements and presents time limits that will be presumed reasonable based on the particular circumstance (e.g., time restriction of 5 years or less for restrictive covenants associated with the sale of a business will be presumed reasonable). More importantly, the new law would allow courts to blue-pencil restrictive covenant agreements by either striking language or reducing the scope of the restrictions. In other words, courts would have the option to modify unenforceable restrictive covenants rather than be forced to invalidate them entirely. ***Why a Constitutional Amendment is Required Before the Law is Effective*** The Georgia Assembly has attempted to enact a similar law before. In its 1991 decision *Jackson v. Coker*, the Georgia Supreme Court declared the General Assembly's enactment of a predecessor noncompete statute unconstitutional. Article III of the Constitution of Georgia 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 defeating or lessening competition, or encouraging a monopoly, which are hereby declared to be unlawful and void." The Supreme Court held that the predecessor statute violated Article III of the Constitution "inasmuch as it is one that authorizes contracts and agreements which may have the effect of or which are intended to have the effect of defeating or lessening competition or encouraging monopoly." To avoid a similar outcome, legislators of HB 173 have proposed an amendment to the Georgia Constitution that would expressly authorize the legislature to enact laws allowing for contracts that restrict competition, so long as such contracts are reasonable in time, geographic area, and line of business. Additionally, the amendment would expressly permit a court to

blue-pencil any deficiencies that prevent enforceability. ***Stay Tuned***

Legislators will submit a proposed amendment to the Georgia Constitution to allow for HB 173 to become effective. Georgia's voting public will decide the proposal's fate at the general election in November 2010. Should the constitutional amendment be ratified, HB 173 will go into effect immediately. We will keep you updated on the status of this legislation.