ALERTS AND UPDATES

Election Results Provide Sweeping Changes for Georgia's Restrictive Covenant Law and Employers

November 5, 2010

In the November 2, 2010, general election, Georgia voters approved Amendment One, officially enacting House Bill 173 ("H.B. 173") and significantly altering Georgia's restrictive covenant law. Historically, Georgia has been viewed by some as hostile toward restrictive covenants, prohibiting the enforcement of any covenant lacking a "reasonable" limitation as to time, geography and scope of activity. Georgia courts applied a strict-scrutiny standard of review in determining a covenant's reasonableness, and Georgia law prohibited courts from "blue-penciling" or otherwise modifying overbroad covenants. Rather, any covenant found to be unlawful was invalidated in its entirety. As a result, employers have long struggled to draft covenants sufficiently restrictive to afford real protection without being so restrictive as to be unenforceable. H.B. 173[1] attempts to remove some of the uncertainty surrounding restrictive covenant law by providing guidance on what types of restrictions are permissible as well as how Georgia courts are to interpret and enforce those restrictions.
Key components of the new law include the following:

- **Blue-Penciling:** Prior to the amendment, Georgia courts were not permitted to modify or redraft an overbroad restrictive covenant to make it enforceable. As a result, if any portion of a restrictive covenant was found to be unenforceable, the entire covenant was invalid. Under the new law, Georgia courts are now authorized to modify or blue-pencil a covenant that is otherwise void and unenforceable, as long as the modification does not render the covenant more restrictive of the employee than as originally drafted. This change is likely to significantly ease the burden on employers, who are now free to draft restrictive covenants with the knowledge that, even if found to be overbroad, a court may still enforce the restriction.
- **Scope of Prohibited Activities, Products or Services:** Under the previous law, courts routinely struck down restrictive covenants because they were not sufficiently specific about the types of competitive activities, products or services the restricted employee was prohibited from engaging in or selling. Under the new law, any description of competitive activities, products or services shall be satisfactory if it provides fair notice of the maximum reasonable scope of the restraint. Furthermore, any good-faith estimate of the activities, products or services that might be applicable at the time of termination would be satisfactory, even if it mistakenly included extraneous matters.
- **Time Limitations:** The new law instructs Georgia courts to presume certain time limitations in restrictive covenants to be reasonable and, thus, enforceable. In the employment context (as opposed to a sale-of-business context), covenants restricting competition and solicitation for two years or less are presumed reasonable, while covenants of more than two years are presumed unreasonable. It is important to note that courts now have the option to modify an overbroad time limitation rather than invalidating the covenant in its entirety. The new law also provides employers with greater leeway in protecting confidential information. Prior to the amendment, nondisclosure covenants protecting confidential information that did not constitute a trade secret were required to have a reasonable time limit. Under the new law, no time limit is necessary, and employers can now protect information as long as it remains confidential.
- **Geographic Scope / Material Contact:** Under the old law, restrictive covenants could not contain shifting geographic scopes. In other words, the geographic limitation had to be ascertainable at the time the agreement was executed. Furthermore, any geographic limitation had to be narrowly tailored to describe specifically the area in which the employee actually worked. Under the new law, the geographic scope may be determined by the employee's covered territory at the time of termination. In addition, broader descriptions and good-faith estimates of the employee's territory are acceptable. The new law also broadens the "material contact" provision often included in nonsolicitation covenants. Under the old law, employers could only prohibit employees from soliciting former customers with whom they had "material contact," which was interpreted to mean contact between the employee and customer for the purpose of establishing or maintaining a business relationship. The new law extends the definition of material contact to include customers or prospective customers "about whom the employee obtained confidential information in the ordinary course of business as a result of such employee's association with the employer" or "who receives products or services authorized by the employer, the sale or provision of which results or resulted in compensation, commissions, or earnings for the employee within two years prior to the date of the employee's termination." This expanded definition of material contact appears to significantly increase the protection afforded to employers, as they can potentially prohibit employees from soliciting customers or prospects with whom the employee may never have dealt.

- **Covered Employees:** The new law applies only to employment covenants with executive employees; employees or independent contractors in possession of confidential information that is key to the employer's business, and employees with specialized skills, knowledge or customer contacts.

Employers should be aware that the new law applies only to contracts or agreements entered into on or after November 3, 2010. Thus, in order to take advantage of the new law's employer-friendly provisions, employers may want to consider consulting with legal counsel to revise existing employment agreements.

For Further Information

If you have any questions about this *Alert*, please contact any of the attorneys in our Employment, Labor, Benefits and Immigration Practice Group or the attorney in the firm with whom you are regularly in contact.

Note

1. Now codified at O.C.G.A. § 13-8-50, *et seq*.