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Client Alert

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Georgia Enacts New Law Governing Noncompete Agreements

On November 2, 2010, Georgia voters approved an amendment to the Georgia Constitution that will drastically change the legal landscape for employers seeking to protect their confidential information and other legitimate business interests. The amendment makes effective House Bill 173, which was passed by the Legislature and signed into law by Governor Perdue last year in an effort to encourage companies to do business in Georgia. The new law will now be codified at O.C.G.A. § 13-8-50 *et seq*.

Historical Background

In the past, the Georgia courts, guided by decisional law rather than statute, have defined what constitutes an enforceable "restraint on trade," and thus, what restrictions can and cannot be placed on competitive action by former employees. Because the courts have been bound by existing legal precedent, this case law has been very slow to adjust to modern business reality. The rules and guiding principles were perceived by many to be outdated and to hinder the attraction of new business to Georgia. With the enactment of the new law, Georgia employers will have considerably more ability to utilize and enforce restrictive covenants, such as noncompete, customer nonsolicitation, and nondisclosure agreements, with their key employees so that the employers' proprietary information and other legitimate business interests will be protected.

Highlights Of The New Law

While there are numerous important aspects to the new law, the following points are particularly significant.

First, the new law does not apply to all employees, but rather only those who have access to the kinds of sensitive business information that warrant protection. Indeed, the definition of "employee" extends only to executives, research and development personnel or other persons in possession of the employer's confidential information, and employees in possession of selective or specialized skills, learning, or abilities or customer contacts or information. Thus, "rank and file" employees who do not have access to their employer's proprietary information in some fashion should not be subject to restrictive covenants governed by the new law.

Second, the law provides some long-sought-after guidance as to the scope of restrictive covenants that will be deemed enforceable. With respect to true noncompete agreements, the amendment changes the current law concerning

the permissible geographic scope of an enforceable agreement. Rather than being tied to the geographic area in which a former employee physically worked, a noncompete provision can now extend to the area in which the employer does business (so long as such area is reasonable). In the alternative, a noncompete provision can list specific competitors of an employer for which an employee will not be allowed to work. Such changes are significant in today's business environment, in which an employee may physically sit in one place while conducting business on the other side of the state or the country.

The new law further clarifies that, in addition to or in lieu of a noncompete agreement, an employer may utilize and enforce a customer nonsolicitation provision, pursuant to which a former employee is prohibited from soliciting business on behalf of a competitor from customers, or prospective customers, of his former employer with whom the employee had material contact. Such provisions do not require a geographic limitation and are particularly useful in the sales context.

The law moreover gives guidance as to the time limitations that will be deemed reasonable, and therefore enforceable, for restrictive covenants. In the employment context, the new law provides a rebuttable presumption that a two-year limitation following the termination of employment will be reasonable with respect to noncompete and customer nonsolicitation agreements. In a significant change from current law, the law provides that nondisclosure provisions seeking to prevent the disclosure of an employer's confidential business information or trade secrets need not have a time limitation, but may continue in effect for so long as the information in question remains confidential.

Finally, the new law allows courts to "blue pencil," or modify, a restrictive covenant that they deem to be overbroad or unreasonable. Although courts in the vast majority of states other than Georgia had long possessed this power, this aspect of the new law represents a sea change for Georgia law. Prior to its enactment, if any portion of a noncompete or nonsolicitation provision was found to be unreasonable, the entire covenant would be deemed unenforceable. Now, a court may choose to enforce a provision only to the extent that it is necessary and reasonable to protect the employer's legitimate business interests.

Looking Ahead

Clearly, the passage of the new law will allow employers more latitude to craft reasonable restrictive covenants for their employees that protect the employer's legitimate business interests. Employers should be mindful, however, that the new law applies only to those agreements executed on or after the law's effective date. There is some dispute about whether the law became effective immediately upon the passage of the amendment, as provided by the House Bill, or whether it will become effective on January 1, 2011, when constitutional amendments generally take effect. Given this confusion, the safest course for employers is to assume that the new law will not take effect until the new year.

In any event, employers desiring to take advantage of the new law will need to have their employees execute new agreements. For employers that do not currently have restrictive covenant agreements in place with their employees, now is a good time to implement such a practice to ensure that the employer's sensitive business information is not improperly used or disclosed in the event of the departure of a key employee.

Given the complexities of the new law, it would be advisable to have these new agreements reviewed by counsel so that they will have the greatest potential for being fully enforced by the courts.

If you have any questions about the new law or if you need assistance in drafting restrictive covenants for your workforce, please contact one of the attorneys listed on the first page of this Alert.