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Georgia Voters Pass Constitutional Amendment Strengthening Enforceability of Non-Compete Agreements and Restrictive Covenants

When asked on November 2, 2010, “Shall the Constitution of Georgia be amended so as to make Georgia more economically competitive by authorizing legislation to uphold reasonable competitive agreements,” Georgia voters overwhelmingly answered “Yes.”

By this vote, the Georgia voters approved the Restrictive Covenants Act, a law that will dramatically alter Georgia’s legal landscape regarding non-compete agreements and other restrictive covenants. The Act increases the enforceability of these agreements and allows courts to modify them to the extent reasonably necessary to enforce and protect legitimate business interests. In order to become effective, Georgia residents had to amend the state Constitution — an event that happened during Georgia’s general election. Although there is a question regarding when the Act actually will become effective, by its own terms, it became effective on November 3, 2010. Below is a summary of some of the key provisions of the new law.

In general, the Act authorizes the enforcement of contracts that restrict competition, so long as they are reasonable in time, geographic area, and scope of prohibited activity. One of the

most significant ramifications of the Act is that it now permits “blue penciling” -- the ability of courts to modify or delete overbroad or invalid provisions, making the restrictive covenant enforceable. This provision brings Georgia in line with a majority of other states that allow this type of judicial modification.

Additionally, the Act expressly deems restrictive covenants with a duration of two years or less presumptively reasonable, and those attempting a longer duration presumptively unreasonable. But the Act fails to include a similar “presumptively reasonable” time limitation for nondisclosure covenants. Under the Act, nondisclosure agreements generally may last so long as the information remains “confidential” or a “trade secret.”

As to geographic area, the Act does not require non-solicitation agreements to contain an express geographic definition. This provision enables employers to enforce non-solicitation restrictions that lack an express reference to a specific territory or geographic area, and further allows that territory to include prospective customers. Language prohibiting “soliciting or attempting to solicit business from customers” is defined to include those customers and prospective customers that the employee

had material contact with, involving products and services that are competitive with the employer's business.

The new Act is not limited to the employment context, and has separate provisions specifically addressing restrictive covenants involving the sale of a business, distributors, dealers, franchisees, lessee's of real property or personal property, and licensee's of a trademark, trade dress, or service mark, as well. For example, restrictive covenants in a sale of a business are presumptively reasonable for five years,

or as long as payments are being made to the seller, whichever period is longer.

These changes to Georgia law will most certainly result in increased enforcement of restrictive covenants in the Georgia courts in a variety of circumstances. However, in analyzing all of the Act's favorable provisions, it is important to understand that the Act still contains some limitations. These new provisions apply only to contracts entered into on or after November 3, 2010, and prior agreements and contracts will be enforced under the former

interpretive framework established by the courts. Additionally, some of the key provisions related to employment apply only to (i) sales and business development professionals; (ii) managers or department heads; (iii) key employees; and (iv) "professionals," as those terms are defined by the statute.

In light of this new law, companies are encouraged to review and examine any "form" non-compete and non-solicitation agreements and purchase agreements, and evaluate whether revised agreements may be beneficial.

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