Restrictive Covenants in Employment and Commercial Contracts

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Finally! Guidance from the Court of Appeals

- Two Court of Appeals decisions in 2018 regarding the “new” statute.
  - Non-competes are statutorily required to contain geographical limitations.
  - Upholds 3-mile non-compete against hairdresser.
The Restrictive Covenant Act

- HB 173 originally signed into law in April 2009.

- A statewide referendum on an enabling amendment to the Georgia Constitution passed on November 2, 2010.

- HB 30 signed into law in May of 2011.

- The new law is codified at O.C.G.A § 13-8-50 et. seq.
The Amendment

- Art. III, § 6, ¶ 5(c) of the Georgia Constitution has now been amended in ¶ 5 (c)(2) to allow the General Assembly to provide by general law for judicial enforcement of agreements “restricting or regulating competitive activities” between employers and employees and other described relationships.
- ¶ 5(c)(3) “grant[s] to the Courts by general law the power to limit the duration, geographic area and the scope of the prohibited activities provided in a contract or agreement restricting or regulating competitive activities to render such contract or agreement reasonable under the circumstances for which it was made.”
Does it Apply Retroactively?

- The statute only applies to contracts entered into on or after the effective date of the legislation and does not apply in actions determining the enforceability of restrictive covenants entered into before such date.

Can the Law be Challenged?

• It is possible that the ballot language of the referendum may be challenged as inaccurate or misleading.

• “Shall the Constitution of Georgia be amended so as to make Georgia more economically competitive by authorizing legislation to uphold reasonable competitive agreements?”
Can the Law be Challenged?

• Courts conduct “only a minimal review of ballot language if the state followed all of the constitutionally and statutorily required procedures for amending the constitution.”


• “The only limitation on the General Assembly in drafting ballot language is that the language be adequate to enable the voters to ascertain which amendment they are voting on.” *Id.*

• Common sense suggests the courts might be skeptical and find a way to invalidate it.
To Whom Does it Apply?

§ 13-8-52. Applicability of article

(a) The provisions of this article shall be applicable only to contracts and agreements between or among:

(1) Employers and employees, as such terms are defined in Code Section 13-8-51;
(2) Distributors and manufacturers;
(3) Lessors and lessees;
(4) Partnerships and partners;
(5) Franchisors and franchisees;
(6) Sellers and purchasers of a business or commercial enterprise; and
(7) Two or more employers.

(b) The provisions of this article shall not apply to any contract or agreement not described in subsection (a) of this Code section.
To Whom Does it Apply?

“Employees”

Executive Employees.

“Executive Employee” means a member of the board of directors, an officer, a key employee, a manager, or a supervisor of an employer.

O.C.G.A. §§ 13-8-51(5)(A); 13-8-51(7)
“Key Employee”

means an employee who, by reason of the employer's investment of time, training, money, trust, exposure to the public, or exposure to customers, vendors, or other business relationships during the course of the employee's employment with the employer:

- has gained a high level of notoriety, fame, reputation, or public persona as the employer's representative or spokesperson;
- has gained a high level of influence or credibility with the employer's customers, vendors, or other business relationships; or
- is intimately involved in the planning for or direction of the business of the employer or a defined unit of the business of the employer.

O.C.G.A. § 13-8-51(8)
“Key Employee”
also means an employee in possession of selective or specialized skills, learning, or abilities or customer contacts or customer information who has obtained such skills, learning, abilities, contacts, or information by reason of having worked for the employer.
O.C.G.A. § 13-8-51(8)
To Whom Does it Apply?

“Employee” also means:

(B) Research and development personnel or other persons or entities of an employer, including, without limitation, independent contractors, in possession of confidential information that is important to the business of the employer;

(C) Any other person or entity, including an independent contractor, in possession of selective or specialized skills, learning, or abilities or customer contacts, customer information, or confidential information who or that has obtained such skills, learning, abilities, contacts, or information by reason of having worked for an employer; or

(D) A franchisee, distributor, lessee, licensee, or party to a partnership agreement or a sales agent, broker, or representative in connection with franchise, distributorship, lease, license, or partnership agreements.

O.C.G.A. § 13-8-51(5)
Who is Excluded?

“Employee” shall not include any employee who lacks selective or specialized skills, learning, or abilities or customer contacts, customer information, or confidential information.

O.C.G.A. § 13-8-51(5)
Who is Excluded? – Non-Competes

… enforcement of contracts that restrict competition after the term of employment, as distinguished from a customer nonsolicitation provision … or a nondisclosure of confidential information provision … shall not be permitted against any employee who does not, in the course of his or her employment:

(1) Customarily and regularly solicit for the employer customers or prospective customers;

(2) Customarily and regularly engage in making sales or obtaining orders or contracts for products or services to be performed by others;

O.C.G.A. § 13-8-53(a)
Who is Excluded? – Non-Competes

(3) Perform the following duties:

(A) Have a primary duty of managing the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(B) Customarily and regularly direct the work of two or more other employees; and

(C) Have the authority to hire or fire other employees or have particular weight given to suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees; or

(4) Perform the duties of a key employee or of a professional.

O.C.G.A. § 13-8-53(a)
“Professional”

Means an employee who has as a primary duty the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

Such term shall not include employees performing technician work using knowledge acquired through on-the-job and classroom training, rather than by acquiring the knowledge through prolonged academic study, such as might be performed, without limitation, by a mechanic, a manual laborer, or a ministerial employee.

O.C.G.A. § 13-8-51(14)
Who is Excluded? – Non-Competes

- *Kennedy v. The Shave Barber Co., LLC*,

- 3-mile non-compete.
- Non-solicit with respect to customers with whom she had contact or learned of during her employment.
- Employee non-solicit.
Who is Excluded? – Non-Competes

- *Kennedy v. The Shave Barber Co., LLC,*
  - Employee resigned and opened her own salon 2.1 miles away.
  - Announced resignation via social media by posting a picture of her work station at The Shave.
  - By tagging The Shave in her post, her post appeared on The Shave’s social media accounts.
  - She also re-posted pictures taken of her customers at The Shave and tagged them.
Who is Excluded? – Non-Competes

- *Kennedy v. The Shave Barber Co., LLC*,

- Trial court finds covenants reasonable and enforceable.
- Enters injunction
  - Prohibiting her from owning, operating, promoting, selling for, soliciting for, consulting for, controlling, or participating in the ownership, operation, or management of a business selling or providing services that are the same or similar to those provided by The Shave within a 3-mile radius of The Shave.
  - Prohibiting her from interfering with or soliciting or attempting to solicit any customer or potential customer of The Shave with whom she had personal or material contact.
  - Prohibiting her from recruiting or soliciting or attempting to recruit or solicit any employee of The Shave.
Who is Excluded? – Non-Competes

- *Kennedy v. The Shave Barber Co., LLC,*

  - On appeal, Kennedy argues she is not the type of employee against whom a non-compete is permitted.
  - Court finds for employer on the grounds that
    - She expressly agreed to customarily and regularly solicit customers and potential customers in her employment contract.
    - She had direct, extensive contact with customers and customarily and regularly solicited customers on behalf of the company.
Who is Excluded? – Non-Competes

• *Kennedy v. The Shave Barber Co., LLC,*

  • Evidence on which Court relied:
    • Kennedy regularly posted her work schedule and a link to The Shave’s website to her social media accounts.
    • She encouraged clients and potential clients to patronize The Shave.
    • She posted pictures of services she provided at The Shave.
    • She directly mentioned, linked or tagged The Shave in her social media posts.
    • The Shave assisted Kennedy in developing close and substantial relationships by expending considerable resources in developing its name recognition and customer base.
Who is Excluded? – Non-Competes

- *CSM Bakery Solutions v. Debus*,

- CSM and Lawrence foods -- competing bakery manufacturers.
- Debus works for CSM as a technical services sales representative and then a sales rep.
- She leaves CSM to work for Lawrence.
- Non-compete governed by the “new” law.
- Judge Batten finds Debus does not fit within the category of employees for whom non-competes are permitted.
Who is Excluded? – Non-Competes

- *CSM Bakery Solutions v. Debus*

  - Extensive discussion of Debus’ employment duties at CSM.
  - She was hired for her ability to make and decorate cakes.
  - She worked with CSM’s customer, Jewel.
  - As TSSR --
    - Trained and assisted cake decorators on the decoration and display of cakes in Jewel stores.
    - Promoted new ideas for Jewel to use in designing and displaying cakes to customers.
    - Did not take orders or negotiate price with customer.
  - Promoted to sales representative.
    - Still had 2 supervisors on the Jewel account.
    - Still did not take orders or negotiate price.
Who is Excluded? – Non-Competes

- *CSM Bakery Solutions v. Debus*
  - At Lawrence Foods, performing same or similar duties – sales technician/cake decorator.
  - CSM argues non-compete is enforceable under 13-8-53(a)(1) and (2).
    - Debus continuously and regularly solicited and/or made sales to Jewel.
    - Sales entail more than just placing or taking an order.
    - Includes process of convincing a customer to purchase new or larger quantities of products.
Who is Excluded? – Non-Competes

- **CSM Bakery Solutions v. Debus**
  
  - Self-evaluation – “aimed to bring more products into the territory that will be successful to [the] customers and benefit CSM.”
  - Court:
    - This work was the job of everybody that works at CSM.
    - Does not show she was involved in sales, but that she, along with everyone else at CSM, worked to be quality employees for CSM.
    - Deposition testimony more persuasive than self-evaluation in which Debus had an incentive to cast her responsibilities in the most expansive light.
Who is Excluded? – Non-Competes

• *CSM Bakery Solutions v. Debus*

  • Sales representative title
    • Not sufficient to show she made or solicited sales.
    • Fact that title mentions involvement in sales, not conclusive that title reflected actual duties.
    • Supervisor testified that her role did not change when she was promoted from TSSR to sale rep.
    • As sales rep, she did not solicit customers.
    • CSM did not hire another TSSR after she was promoted to sales rep.
Who is Excluded? – Non-Competes

- *CSM Bakery Solutions v. Debus*

- **E-mails**
  - E-mails with supervisor suggesting a cupcake promotion, making her supervisors aware of potential discounted products, asking about the potential role of key account manager, requesting a product’s price and providing her open “sales projects” on her last day.
  - Not sufficient to demonstrate sales role.
  - CSM could only come up with 6 e-mails over last 5 years of employment.
  - Anyone involved in sales would be in frequent contact with customers.
  - E-mails show she had important role with products sold to customer, but also show she was a subordinate who sought permission from supervisors on matters of sales.
  - Supervisor testified she was not aware of Debus making sales.
Who is Excluded? – Non-Competes

- *CSM Bakery Solutions v. Debus*

  - Resume to Lawrence Foods
    - “Key Skill: Bakery Product Sales”
    - Merely represents her interpretation of what skills and experience she had developed throughout her career.
    - Generic and generalized skills without substance elaborating.
    - Difficult to glean what she did at CSM just from a skill entitled “Bakery Product Sales.”
    - Drafted with hope of getting hired, so presumably erred on the side of overstating her skills and experience.
Who is Excluded? – Non-Competes

• **CSM Bakery Solutions v. Debus**

  • Training Jewel employees and bakery managers
    • How to decorate baked goods, how to present goods in stores and how to work with new products.
    • Attended seasonal sales meetings to present new products to Jewel.
    • CSM says this created ongoing relationship with Jewel.
    • Not sufficient.
    • Role at seasonal meetings was only to help choose items to be presented and prepare items to be shown at the meetings.
    • Meetings with bakery managers only to show them products that would be available and how to best prepare them.
    • Any actual orders occurred during follow up by the account manager.
Who is Excluded? – Non-Competes

- *CSM Bakery Solutions v. Debus*
  - No sales records, commission sheets for Debus
    - Lack of evidence one would expect if former employee regularly solicited customers or made sales.
  - If Court interpreted statute in accordance with CSM’s reading, the statute would become meaningless because it would apply to every employee who positively impacts a company’s sales efforts.
Who is Excluded? – Non-Competes

- *CSM Bakery Solutions v. Debus*

  - CSM argues 13-8-53(a)(3).
    - As sales rep, Debus managed 2 employees and had authority to hire/fire.
    - Debus described her role with CSM as managing a territory.
  - Still not good enough
    - Primary duty with the company did not consist of managing the Jewel account.
    - She had 2 supervisors on the account.
    - Her conduct was managed by those supervisors.
    - Not the types of activities the legislature had in mind when requiring that the employee “[h]ave a primary duty of managing the enterprise…”
• **CSM Bakery Solutions v. Debus**

  • One last argument by CSM – Key Employee
    
      - Debus “gained a high level of notoriety, fame, reputation, or public persona as the employer’s representative or spokesperson or has gained a high level of notoriety, level of influence or credibility with the employer’s customers, vendors, or other business relationships…”
    
      - Resume shows her work allowed her to develop strong relationships with Jewel employees.
    
      - Held: While Jewel employees respected Debus, her role and status with the company do not indicate she was a key employee.
    
      - International business with thousands of employees worldwide.
    
      - Debus was one of the lower-ranking employees.
    
      - Legislature’s intent to limit the application of the statute to certain employees would be frustrated if the court agreed with CSM’s definition of “key employee” because virtually any employee with customer interaction could be covered.
The person seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant.

O.C.G.A. § 13-8-55
“Legitimate business interest” includes, but is not limited to:

(A) Trade secrets, as defined by Code Section 10-1-761, et seq.;

(B) Valuable confidential information that otherwise does not qualify as a trade secret;

(C) Substantial relationships with specific prospective or existing customers, patients, vendors, or clients;

O.C.G.A. § 13-8-51(9)
Legitimate Business Interest

(D) Customer, patient, or client good will associated with:

(i) An ongoing business, commercial, or professional practice, including, but not limited to, by way of trade name, trademark, service mark, or trade dress;

(ii) A specific geographic location; or

(iii) A specific marketing or trade area; and

(E) Extraordinary or specialized training.

O.C.G.A. § 13-8-51(9)
In determining the enforceability of a restrictive covenant, it is not a defense that the person seeking enforcement no longer continues in business in the scope of the prohibited activities that is the subject of the action to enforce the restrictive covenant if such discontinuance of business is the result of a violation of the restriction.

O.C.G.A. § 13-8-58(b)
Legitimate Business Interest

- *NCR Corporation v. Manno*,

- Manno works for NCR as area general manager.
- Promoted to VP of Field Services for the U.S.
- Acted as point of contact with NCR customers who had service problems with ATM’s.
- Personally met with largest customers – Bank of America, Wells Fargo, Chase.
- In this “high-level” role, had access to detailed information about NCR’s clients.
Legitimate Business Interest

• *NCR Corporation v. Manno*

  • Manno leaves NCR to join competitor, Hyosung.
  • VP of service deliver and sales at Hyosung.
  • Hyosung is on the listed competitors in the non-compete.
  • In resume to Hyosung, Manno described his activities at NCR as having “managed an $800M US operations business.”
  • In an e-mail, he described himself as “the main level of contact or highest level of contact” for many of NCR’s largest customers.
Legitimate Business Interest

- *NCR Corporation v. Manno*

- Manno does not argue not within category of people who can be subject to non-compete.
- He argues NCR has not established a legitimate business interest and the geographic restriction is overbroad.
Legitimate Business Interest

- NCR Corporation v. Manno

  - Legitimate business interest argument.
    - All information to which he was exposed at NCR is now either unusable or stale.
    - NCR has failed to show he has attempted to solicit NCR clients or use NCR’s information.
    - Judge Batten finds NCR need not show Manno actually used NCR’s information.
    - Rather, it need only establish it has a legitimate business interest that the covenant was designed to protect.
    - NCR also had a protectable interest in the substantial relationships Manno had with specific customers. See O.C.G.A. §13-8-51(9)(C).
In determining the reasonableness in time of a restrictive covenant sought to be enforced \textbf{after} a term of employment, a court shall apply the rebuttable presumptions provided in this Code section.

O.C.G.A. § 13-8-57(a)
Time Limitations – Post-Term Covenants

- Former employees – 2 years.
- Former distributors, dealers, franchisees, lessees of real or personal property, or licensees of a trademark, trade dress, or service mark – 3 years.

O.C.G.A. § 13-8-57 (b) and (c).
Time Limitations – Post-Term Covenants

In the case of a restrictive covenant sought to be enforced against the owner or seller of all or a material part of:

(1) The assets of a business, professional practice, or other commercial enterprise;
(2) The shares of a corporation;
(3) A partnership interest;
(4) A limited liability company membership; or
(5) An equity interest or profit participation, of any other type, in a business, professional practice, or other commercial enterprise…
… a court shall presume to be reasonable in time any restraint the longer of five years or less in duration or equal to the period of time during which payments are being made to the owner or seller as a result of any sale referred to in this subsection and shall presume to be unreasonable in time any restraint more than the longer of five years in duration or the period of time during which payments are being made to the owner or seller as a result of any sale referred to in this subsection, measured from the date of termination or disposition of such interest.

O.C.G.A. § 13-8-57(d)
Territory

• Whenever a description of … geographic areas, is required by this Code section, any description that provides fair notice of the maximum reasonable scope of the restraint shall satisfy such requirement, even if the description is generalized or could possibly be stated more narrowly to exclude extraneous matters.

• In case of a postemployment covenant entered into prior to termination, any good faith estimate of the … geographic areas, that may be applicable at the time of termination shall also satisfy such requirement, even if such estimate is capable of including or ultimately proves to include extraneous activities, products, and services, or geographic areas.

O.C.G.A. § 13-8-53(c)(1)
The postemployment covenant shall be construed ultimately to cover only so much of such estimate as relates to … the geographic areas actually involved within a reasonable period of time prior to termination.

O.C.G.A § 13-8-53(c)(1)
The phrase “the territory where the employee is working at the time of termination” or similar language shall be considered sufficient as a description of geographic areas if the person or entity bound by the restraint can reasonably determine the maximum reasonable scope of the restraint at the time of termination.

O.C.G.A § 13-8-53(c)(2)
In determining the reasonableness of a restrictive covenant that limits or restricts competition during or after the term of an employment or business relationship, the court shall make the following presumptions:

(2) A geographic territory which includes the areas in which the employer does business at any time during the parties' commercial relationship, even if not known at the time of entry into the restrictive covenant, is reasonable provided that:

(A) The total distance encompassed by the provisions of the covenant also is reasonable;

(B) The agreement contains a list of particular competitors as prohibited employers for a limited period of time after the term of employment or a commercial or business relationship; or

(C) Both subparagraphs (A) and (B) of this paragraph;

O.C.G.A. § 13-8-56(2)
• **NCR Corporation v. Manno**

  • Territory argument.
  • Manno argues the geographic restriction is over broad.
  • Manno’s agreement with NCR stated that employees are prohibited from working
    • for any of the named companies on the list of competing organizations, or
    • “within the territory where or for which [an employee] performed such services in the two years preceding [the employee’s] termination to the extent a specific geographic territory was assigned to [the employee] or, if no territory was assigned to the employee, then within a 250-mile radius from the primary office or other location where [the employee] worked during his last two years of his NCR employment.”
• **Territory argument.**
  
  • Under O.C.G.A. §13-8-56(2), a geographic restriction is reasonable where it includes areas in which the employer does business at any time during the parties’ relationship or a list of particular competitors as prohibited employers or both.
  
  • Judge Batten finds the covenant conforms to the statute by including a list of competitors and the area where NCR does business.
  
  • Manno argues the covenant imposes a worldwide restriction, but Judge Batten finds that the covenant does not use the term worldwide; it contains a specific geographic area.
Territory


  - Independent contractor.
  - 1 year covenant.
  - Prohibited contractor from providing any service to any customer with whom he had contact during the term of his relationship with the company.
  - No geographic limitation.
Territory

- *Carpetcare Multiservices, LLC v. Carle*

  - Employee argues covenant is unenforceable due to no geographical limitation.
  - Trial court agrees.
  - Court of Appeals affirms by 2-1 decision.
Territory

• *Carpetcare Multiservices, LLC v. Carle*

  - Majority relies on O.C.G.A. §13-8-53(a) which provides that enforcement of contracts that restrict competition during the term of a restrictive covenant, so long as such restrictions are reasonable in time, geographic area, and scope of prohibited activities, shall be permitted.”
  
  - Interprets this provision to mean that a non-compete must have a reasonable geographic limitation.
  
  - The parties did not dispute that the covenant was a non-compete, rather than a customer non-solicit.
Territory

- Carpetcare Multiservices, LLC v. Carle
  
  - Carpetcare’s argument
    - The statutory requirement of a geographic limitation should not be read literally.
    - Narrowly limiting the covenant to only the customers with whom the contractor dealt met the reasonableness requirements of the statute.
  
  - Majority holds that such an interpretation would ignore the plain and ordinary language of the text.

  - Judge Ray’s dissent
    - Statute does not require a geographic limitation.
    - Only requires that any geographic limitation be reasonable.
    - Company could have drafted more broadly to prohibit any competition, so not a reasonable outcome.
Territory

• *Carpetcare Multiservices, LLC v. Carle*

  • Divided decision, so precedential value is questionable.
  • Court did not address whether the covenant could be saved by “blue-penciling.”
  • Cert. petition filed by employer.
Territory

- *Kennedy v. The Shave Barber Co.*
  
  - 3-mile radius found to be reasonable.
  - Most of The Shave’s customers live and work within 3 miles of the salon.
  - Non-compete applied within 3-miles of *any* location, but there was only one location.
  - Court modified to apply only within 3-miles of the one location and not any future locations.
  - Court of Appeals affirmed.
Activities, Products or Services

Activities, products, or services that are competitive with the activities, products, or services of an employer shall include activities, products, or services that are the same as or similar to the activities, products, or services of the employer.

O.C.G.A § 13-8-53(c)(1)
Activities, Products or Services

• Whenever a description of activities, products, and services ... is required by this Code section, any description that provides fair notice of the maximum reasonable scope of the restraint shall satisfy such requirement, even if the description is generalized or could possibly be stated more narrowly to exclude extraneous matters.

• In case of a postemployment covenant entered into prior to termination, any good faith estimate of the activities, products, and services ... that may be applicable at the time of termination shall also satisfy such requirement, even if such estimate is capable of including or ultimately proves to include extraneous activities, products, and services...

O.C.G.A. § 13-8-53(c)(1)
The postemployment covenant shall be construed ultimately to cover only so much of such estimate as relates to the activities actually conducted, the products and services actually offered … actually involved within a reasonable period of time prior to termination.

O.C.G.A § 13-8-53(c)(1)
Activities, Products or Services

Activities, products, or services shall be considered sufficiently described if a reference to the activities, products, or services is provided and qualified by the phrase “of the type conducted, authorized, offered, or provided within two years prior to termination” or similar language containing the same or a lesser time period.

O.C.G.A. § 13-8-53(c)(2)
In determining the reasonableness of a restrictive covenant ... the court shall make the following presumptions:

The scope of competition restricted is measured by the business of the employer or other person or entity in whose favor the restrictive covenant is given.

O.C.G.A. § 13-8-56(3)
Notwithstanding any other provision of this chapter, enforcement of contracts that restrict competition during the term of a restrictive covenant, so long as such restrictions are reasonable in time, geographic area, and scope of prohibited activities, shall be permitted.

O.C.G.A. § 13-8-53(a)
In determining the reasonableness of a restrictive covenant that limits or restricts competition during or after the term of an employment or business relationship, the court shall make the following presumptions:

(1) During the term of the relationship, a time period equal to or measured by duration of the parties' business or commercial relationship is reasonable, provided that the reasonableness of a time period after a term of employment shall be as provided for in Code Section 13-8-57;

O.C.G.A. § 13-8-56
In-Term Covenants

Any restriction that operates during the term of an employment relationship, agency relationship, independent contractor relationship, partnership, franchise, distributorship, license, ownership of a stake in a business entity, or other ongoing business relationship shall not be considered unreasonable because it lacks any specific limitation upon the scope of activity, duration, or geographic area so long as it promotes or protects the purpose or subject matter of the agreement or relationship or deters any potential conflict of interest.

O.C.G.A. §13-8-56(4)
Notwithstanding any other provision of this chapter, *an employee* may agree in writing for the benefit of *an employer* to refrain, for a stated period of time following termination, from *soliciting, or attempting to solicit*, directly or by assisting others, any business from any of such employer's customers, including actively seeking prospective *customers*, with whom the employee had *material contact* during his or her employment for purposes of providing products or services that are competitive with those provided by the employer's business.

O.C.G.A. § 13-8-53(b)

What about non-solicitation covenants in contexts other than employment?
Non-Solicitation Provisions

- No express reference to geographic area or the types of products or services considered to be competitive shall be required in order for the restraint to be enforceable.

- Any reference to a prohibition against soliciting or attempting to solicit business from customers' or similar language shall be adequate for such purpose and narrowly construed to apply only to: (1) such of the employer's customers, including actively sought prospective customers, with whom the employee had material contact; and (2) products and services that are competitive with those provided by the employer's business.

O.C.G.A. § 13-8-53(b)
Non-Solicitation Provisions

“Material contact” means the contact between an employee and each customer or potential customer:

(A) With whom or which the employee dealt on behalf of the employer;

(B) Whose dealings with the employer were coordinated or supervised by the employee;

(C) 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

(D) 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.

O.C.G.A. § 13-8-51(10)
Non-Solicitation Provisions

• *The Pedowitz Group v. Ogden*,

  • Non-solicitation provision unenforceable because it prohibited defendant from soliciting business from any customer or prospective customer of the company.
Acceptance of Unsolicited Business

A covenant not to compete by definition may preclude the employee from accepting related business (whether solicited or not) from any clients (whether previously contacted by the employee or not) if the employee is officed in, or is to perform the restricted activities in, the forbidden territory.

*Habif, Arogeti & Wynne, P.C. v. Baggett*,

Acceptance of Unsolicited Business

Under case law that pre-dates the new legislation, absent a non-compete, the employer could not prohibit a former employee from merely accepting business from the former employer’s customers without any prior solicitation by the former employee.

*Singer v. Habif, Arogeti & Wynne, P.C.,
250 Ga. 376, 297 S.E.2d 473 (1982)*
Acceptance of Unsolicited Business

The legislation does not seem to have changed this rule; however, presumably the court could blue pencil the “acceptance” language out of the agreement, if it were included.

What Constitutes Solicitation?

- *Kennedy v. The Shave Barber Co.*
  - Kennedy argues that using social media to post pictures of her work and tagging The Shave’s customers in the pictures did not constitute solicitation.
  - Court of Appeals finds sufficient evidence of solicitation to uphold injunction.
    - She used social media during her employment to solicit customers.
    - Her posts were targeted toward informing her former clients that she was opening a new salon.
    - In one post, she implored existing clients to refer new clients in exchange for discounts.
    - Messaging of this nature went beyond a mere general “announcement” of a new position.
Non-Recruitment Covenants

• “Restrictive Covenant” means an agreement between two or more parties that exist to protect the first party’s or parties’ interest in property, confidential information, customer goodwill, business relationships, employees, or any other economic advantages that the second party has obtained for the benefit of the first party or parties…”

O.C.G.A. § 13-8-51(15)

• Does this mean that non-recruitment provisions must comply with the rules set out in the statute?

• If so, it may be more restrictive than previous law.
Burden of Proof

If a person seeking enforcement of the restrictive covenant establishes by prima-facie evidence that the restraint is in compliance with the provisions of Code Section 13-8-53, then any person opposing enforcement has the burden of establishing that the contractually specified restraint does not comply with such requirements or that such covenant is unreasonable.

O.C.G.A. § 13-8-55
Defenses

In determining the reasonableness of a restrictive covenant between an employer and an employee, as such terms are defined in subparagraphs (A) through (C) of paragraph (5) of Code Section 13-8-51, a court may consider the economic hardship imposed upon an employee by enforcement of the covenant; provided, however, that this subsection shall not apply to contracts or agreements between or among those persons or entities listed in paragraphs (2) through (7) of subsection (a) of Code Section 13-8-52.

O.C.G.A. § 13-8-58(d)
Any restrictive covenant not in compliance with the provisions of this article is unlawful and is void and unenforceable; provided, however, that a court may modify a covenant that is otherwise void and unenforceable as long as the modification does not render the covenant more restrictive with regard to the employee than as originally drafted by the parties.

O.C.G.A. § 13-8-53(d)
In any action concerning enforcement of a restrictive covenant, a court shall not enforce a restrictive covenant unless it is in compliance with the provisions of Code Section 13-8-53; provided, however, that if a court finds that a contractually specified restraint does not comply with the provisions of Code Section 13-8-53, then the court may modify the restraint provision and grant only the relief reasonably necessary to protect such interest or interests and to achieve the original intent of the contracting parties to the extent possible.

O.C.G.A. § 13-8-54(b)
**Blue Penciling**

**Modification** means the limitation of a restrictive covenant to render it reasonable in light of the circumstances in which it was made. Such term shall include:

(A) Severing or removing that part of a restrictive covenant that would otherwise make the entire restrictive covenant unenforceable; and

(B) Enforcing the provisions of a restrictive covenant to the extent that the provisions are reasonable.

O.C.G.A. §13-8-51(11)
Blue Penciling


• Decision regarding blue penciling under the new statute.
• Non-compete with no geographic limitation.
• “[Q]uestion in this case is whether ‘modify’ means that courts may only excise offending language, or whether courts are empowered to actually reform and rewrite the contract. Clearly, the former is permitted under the statute, but the latter is an issue of first impression in Georgia.”
Blue Penciling


- Finds that statute is “of little help” and “provides little guidance on whether the courts have the ability to insert language.”

- *Hamrick v. Kelley*, a pre-2011 sale of business case, said “[t]he ‘blue pencil’ marks, but it does not write.”

- “Nothing in the statute makes it clear that the legislature meant to change Georgia’s common law approach to blue-penciling other than to allow it in more circumstances.”
**Blue Penciling**

*LifeBrite Laboratories, LLC v. Cooksey*

- “Employers are sophisticated entities. They have the ability to research the law in order to write enforceable contracts; courts should not have to remake their contracts in order to correct their mistakes.”

- Therefore, the term “modify” in O.C.G.A. §13-8-53(d) means the blue-pencil approach the Georgia Supreme Court took in *Hamrick*.

- “Though courts may strike unreasonable restrictions, and may narrow overbroad territorial designations, courts may not completely reform and rewrite contracts by supplying new and material terms from whole cloth.”
Non-compete does not contain a territory and is thus a global restriction.

The Defendant relied on *LifeBrite* and argued the territory was over broad and could not be rewritten.

However, the non-compete contained a list of prohibited competitors.

Judge Evans found the list constitutes a reasonable territorial restriction under O.C.G.A. section 13-8-56(2)(B).

As the defendant was working for an affiliate of one of the listed competitors, an injunction was entered.
Territory/Activities/Blue Penciling

- *ID Technology v. Hamilton*,

  - Lack of geographic area restriction renders the covenant unenforceable.
  - Total prohibition on defendant working in any capacity for a competitor is unreasonable.
  - Court declines to exercise discretion to “re-write” the covenant.
**Tolling**

- Absent a tolling provision, the duration of the covenants is not tolled during litigation.
  
  *Coffee Systems of Atlanta v. Fox,*
  
  227 Ga. 602, 182 S.E.2d 109 (1971)

- A provision tolling the running of the duration during litigation is enforceable; however, a provision tolling the running of the duration during any period of violation is not enforceable.


- Under the new law, presumably an unenforceable tolling provision is severable and can be blue-penciled.
Sale of Business

When both the Purchase/Sale Agreement and related Employment Agreements contain covenants, under the old law, the Georgia courts generally apply strict scrutiny to the covenants in the Employment Agreements and the more liberal sale of business scrutiny to covenants in the Purchase/Sale Agreement, but decisions from the Georgia Court of Appeals make this a little murky.

For a good discussion on this issue, see Hix v. Aon Risk Servs. S., Inc. 2011 WL 5870059 (N.D.G.A. November 22, 2011)
Lawyers

We are different.

Rule 5.6 of the Georgia Rules of Professional Conduct prohibits “a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement.”
THANK YOU

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