CARLTON FIELDS

Georgia Retreats From Its Historic Hostility Toward Restrictive Covenants in Employment Agreements, But Employers May Have to Wait To Take Advantage

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On November 2, 2010, Georgia voters passed a constitutional amendment that resulted in the enactment of House Bill 173, which is now codified at O.C.G.A. § 13-8-50, et seq. The new law significantly alters Georgia's treatment of restrictive covenants in certain employment agreements, and employers will have fewer obstacles in drafting and enforcing restrictive covenants, including non-competition, non-solicitation, and non-disclosure provisions. The new law applies to agreements between an employer and its executives, key employees, managers, employees possessing confidential information, employees who have obtained specialized skills by way of their employment, and employees who have obtained customer information or customer contact through their employment. While the new law by its terms is effective on November 3, 2010, the constitutional amendment enabling enactment of the new law is by operation of law not effective until January 1, 2011. Members of the Georgia General Assembly have already discussed amending the new law to clarify this issue. Since only agreements entered into after the effective date of the new law receive the benefits of the new law, employers should contact counsel to determine the best course of action based upon their situation. The highlights of this new employer friendly

legislation are as follows:

- Courts will now be allowed to "blue pencil" overly broad restrictive covenants in certain employment agreements to make them enforceable. Under prior law, if any portion of a restrictive covenant in an employment agreement was invalid, the entire covenant was unenforceable. The new law allows courts to enforce overly broad restrictive covenants to the extent reasonable.
- While the new law continues the requirement that a restrictive covenant be reasonable in time, it now provides that a restraint of two years is presumed reasonable. Prior law did not provide this certainty; however, this provision could result in an inference by the courts that a time period greater than two years is unreasonable.
- Under prior law, the restricted territory and activities had to be ascertainable at the time the agreement was entered into. While the new law, just like prior law, requires that the restricted territory and activities to be in line with the subject employee's actual territory and activities at the time of termination, it no longer requires that the agreement specify the restricted territory and activities at the time of execution. Therefore, it is now possible for a restrictive covenant to restrict the terminated employee from participating in those activities in which the employee was participating at the time of termination and in the territory in which the terminated employee was working at the time of termination. This allows a restrictive covenant to grow and change with employee's duties during his or her time of employment.
- Under prior law, a non-disclosure or confidential information restrictive covenant was unenforceable if it did not have a specific time limitation or went beyond what was deemed necessary to protect the employer. The new law provides that an employee may be restricted from disclosing or using confidential information obtained while employed by employer so long as the information remains confidential./LI>
- In the non-solicitation context, the new law specifically provides that the covenant need not specify restricted customers or a restricted territory. General language prohibiting a terminated employee from "soliciting or attempting to solicit business from customers" will be construed to only apply to the employer's actual and actively sought prospective customers with which the terminated employee had material contact and products and services competitive with the employer.

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