

Post Employment Covenants 2010:

A New Dawn or Business as Usual?

Georgia law has long been hostile to post employment restrictive covenants such as covenants not to compete, solicit clients, or solicit employees. Indeed, we have often advised clients that although we would draft restrictive covenants for them, they should not consider those documents enforceable and should act accordingly. Covenants not to compete associated with the sale of a business have had more success being enforced in Georgia, but even those agreements were struck down as unenforceable from time to time.

Last year, the Georgia General Assembly passed a set of laws designed to make restrictive covenants enforceable in Georgia, generally referred to as the Restrictive Covenant Act (RCA). To avoid a constitutional challenge which had struck down prior statutes, this time the legislature made the RCA effective only upon amendment to the Georgia Constitution. On November 2, 2010, the voters overwhelmingly approved the constitutional amendment giving life to the RCA.

The most significant change delivered by the RCA is the 'blue pencil' power it grants to the courts. Under Georgia's former law, if any provision in a restrictive covenant contract was unenforceable, then the court's only remedy was to strike the entire contract as void and unenforceable. The 'blue pencil' rule, allows a court to modify a flawed to make it conform to the RCA and leave the remaining contract provisions in place.

The RCA speaks specifically to 'non-compete' agreements, 'non-solicitation' of customers and employees agreements, and 'nondisclosure' of confidential information covenants. The RCA requires the court to honor the intent of the restrictive covenant contract and protect the employer's legitimate business interests in the contract. The RCA also defines what types of employees may legitimately be restrained by such covenants.

Under the RCA, non-competes must be reasonable in time, geographic area, and scope of prohibited activities. Language that defines the geography in terms of where the employee worked is now expressly allowed under the RCA, making drafting non-competes much easier than before. The RCA also provides clarity around the 'reasonable time' requirement, adopting a presumption that restrictive covenants of two years or less are presumed to be reasonable.

The RCA removes the former law's requirement that the covenant describe with great specificity the precise clients that cannot be solicited and the precise services that they cannot be offered during the restricted time period. Instead, the RCA states that any language attempting to restrict the employee's ability to solicit customers after employment and during the restricted period will be interpreted narrowly to apply to customers with whom the employee had 'material contact' and for the provision of services that are competitive with those provided by the employer.

Non-disclosure covenants were likely the easiest to draft and enforce under the prior law, but like all restrictive covenants, they did require a set time period for the restriction. The RCA dispenses with the time period requirement and allows a non-disclosure agreement to remain in effect as long as the information itself remains confidential.

So Is this Really the Beginning of a New Era?

There is a long history in Georgia of the courts generally opposing restrictive covenants, but the RCA may prove to be the dawning of a new age in Georgia's restrictive covenant law and in employer/employee relationships in general. Nevertheless, business owners would be wise to exercise caution as they enter into this new age.

Restrictive covenants are common to the purchase/sale of a business. Business Brokers should take great care to consult with legal counsel if the transaction is to include any restrictive covenants. With the RCA now in effect, such restrictive covenants may actually be enforced.

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