GEORGIA’S
NEW RESTRICTIVE
COVENANT LAW

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INTRODUCTION

• “10 Philadelphia lawyers”

• Chronology of statutory and constitutional amendments

• Public policy implications
PURPOSE

• New statute designed to:
  – Provide guidance so that parties may be certain of validity and enforceability
  – Provide guidance so parties know their “rights and duties”

OCGA § 13-8-50

• Old law applies to restrictive covenants executed before effective date of the new law
RESTRICTIVE COVENANTS

• What is a Restrictive Covenant?
  – Agreement
  – Two or more parties
    • To protect first party’s interest in property, confidential information, customer good will, business relationships, employees or any other “economic advantages;”
    • That the second party has obtained for the benefit of the first party; and
    • That second party gained access to in relationship with first party.

OCGA § 13-8-51(15)
RESTRICTIVE COVENANTS

• Restrictive covenants may exist in or be ancillary to contracts between:
  – Employers and Employees
  – Distributors and Manufacturers
  – Lessors and Lessees
  – Partnerships and Partners
  – Employers and Independent Contractors
  – Franchisors and Franchisees
  – Sellers and Purchasers of a Business
  – Two or more Employers

The Georgia restrictive covenants statute only applies to contracts between persons and entities listed above.

OCGA §§ 13-8-51(15) and 13-8-52
KEY DEFINITIONS

• Employee:
  – Executive Employee: Director, Officer, Key Employee, or Supervisor
  – Research and development personnel/ possesses important confidential information
  – Any person in possession of selective or specialized skills, learning, or abilities, or customer contacts or customer information obtained by working for the Employer
  – Franchisee, distributor, lessee, licensee, party to partnership agreement
  – Sales agent, broker, or representative in connection with franchise, distributorship, lease, license, or partnership agreements

OCGA § 13-8-15(5)(A) ; OCGA § 13-8-5(B)-(D)
B&T Universe: Due to Employer’s investment of time, training, trust, exposure to public, customers, vendors or other business relationships:

Has high level of notoriety, fame, reputation, or public persona as Employer’s representative or spokesman

Has high level of influence or credibility with customers, vendors, or other business relationships

Intimately involved in the planning or direction of Employer’s business

Has selective or specialized skills, learning, or abilities, or customer contacts or customer information obtained by working for the Employer

B&T User, 2/27/2012
KEY DEFINITIONS

• Employee:
  – Shall *not* include any employee who *lacks*
    • Specialized skills, learning, or abilities
    • Customer contacts, customer information, or confidential information

OCGA § 13-8-5
KEY DEFINITIONS

• Confidential Information – Data or Information
  – Relating to the business of the employer
  – Disclosed to Employee or Employee aware of as a result of employment with Employer
  – Having value to the Employer
  – Not generally known to competitors
  – Includes trade secrets, methods of operation, customer names, price lists, financial information and projections, route books, personnel data and similar information

OCGA § 13-8-51(A)-(E)
KEY DEFINITIONS

• Confidential Information shall not mean data and information
  – Voluntarily disclosed to the public, except when by unauthorized employee
  – Independently developed and disclosed by others
  – Entered public domain by lawful means

OCGA § 13-8-51
KEY DEFINITIONS

- Legitimate Business Interest includes protecting
  - Trade Secrets
  - Valuable Confidential Information
  - Substantial relationship with specific prospective or existing customers, patients, vendors, clients
  - Customer, patient or client good will associated with
    - An ongoing business, commercial or professional practice (including trade name, trademark, service mark, trade dress)
    - Specific geographic location
    - Specific marketing or trade area
  - Extraordinary or specialized training

OCGA § 13-8-51(9)
Non-Compete Covenant During Termination Of Employment

- Contracts that restrict competition *during* the term of a restrictive covenant are permitted so long as restrictions are reasonable as to
  - Time
  - Geographic Area
  - Scope of Prohibited Activities

OCGA § 13-8-53(a)
Non-Compete Covenant
During Termination Of Employment

- Restrictive covenant *during* the term of the relationship not unreasonable if it lacks “specific limitation upon scope of activity, duration, or geographic area” if it:
  - Promotes or protects purpose of the agreement, or
  - Deters potential conflict of interest

OCGA § 13-8-56(4)
Non-Compete Covenant
After Termination Of Employment

• However, as to contracts that restrict competition after the term of employment, they shall not be permitted against any employee who does not:
  – Customarily and regularly solicit for employer customers or prospective customers
  – Customarily and regularly engage in making sales or obtaining orders or contracts to be performed by others
  – Perform following duties:
    • Primary duty of managing the enterprise or department or division thereof
    • Customarily direct the work of two or more employees
    • Have authority to hire or fire or have particular weight given to suggestions and recommendations as to hiring, firing, advancement, promotion
    • Perform duties of Key Employee
Non-Compete Covenant
After Termination Of Employment

• Time restriction
  – Rebuttable presumptions
  – Against former employee not associated with sale of business
    • Two years or less presumed reasonable
    • More than two years presumed unreasonable

OCGA § 13-8-57(b)

– Against seller of business, the longer of
  • Five years or less, or
  • The period of time during which payments are being made is presumed reasonable

OCGA § 13-8-52(d)
Non-Compete Covenant After Termination Of Employment

- Description of Geographic area
  - Any description that provides “fair notice of the maximum reasonable scope of the restraint” sufficient even if “generalized” or “could be stated more narrowly”
  - “Good faith estimate” of geographic area applicable at time of termination is sufficient even if the estimate is capable of including or includes “extraneous geographic areas”
  - Covenant shall be construed only to cover so much of the “estimate” as relates to the “geographic areas actually involved within a reasonable period of time prior to termination”
  - The term “the territory where is employee is working at the time of termination” or similar language is sufficient if employee can “reasonably determine the maximum reasonable scope of the restraint at the time of termination”

OCGA § 13-8-53(c)
Non-Compete Covenant After Termination Of Employment

- Geographic restriction
  - Geographic territory where employee working within reasonable period of time prior to termination

  OCGA §13-8-53(c)(1)

  - Geographic territory which includes areas in which employer does business at any time during the relationship – even if not known at the inception of contract – is presumed reasonable provided:
    - Total distance encompassed is reasonable;
    - Contract contains a list of particular competitors as prohibited employers for a limited period of time after termination; or
    - Both.

  OCGA §13-8-56(2)
Non-Compete Covenant After Termination Of Employment

• Scope of competition restricted is presumed reasonable if it is “measured by the business of the Employer”

• Description of scope of competitive activities, products, or services
  – Activities, products, or services “same or similar to” those of employer
  – Any description that provides “fair notice of the maximum reasonable scope of the restraint” sufficient even if “generalized” or “could be stated more narrowly”
  – “Good faith estimate” of activities, products or services applicable at time of termination is sufficient even if the estimate is capable of including or includes “extraneous matters”
  – Covenant shall be construed only to cover so much of the “estimate” as relates to the “activities actually conducted” or “products or services actually provided”
  – Activities, products, or services shall be sufficiently described if 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

OCGA § 13-8-53(c) and 13-8-56(3)
Non-Solicitation Covenant
After Termination of Employment

• Employee may agree to refrain
  – From soliciting or attempting to solicit, directly or indirectly by assisting others,
  – any business from employer’s customers, or actively seeking prospective customers,
  – with whom Employee had Material Contact
  – for purpose of providing products or services competitive with Employer’s business.

OCGA § 13-8-53(b)
Non-Solicitation Covenant
After Termination of Employment

• Material Contact
  – Between an Employee and customer or potential customer;
  – With whom Employee dealt with on behalf of Employer;
  – Whose dealing with Employer were coordinated or supervised by Employee;
  – About whom Employee obtained Confidential Information; or
  – Who receives products or services from Employer, the sale of which results in compensation, commissions, or earnings for Employee within two years prior to date of Employee’s termination.

OCGA § 13-8-51(10)
Non-Solicitation Covenant
After Termination of Employment

• Time restriction
  – Rebuttable presumptions
  – Against former employee not associated with sale of business
    • Two years or less presumed reasonable
    • More than two years presumed unreasonable

OCGA § 13-8-57(b)
Non-Solicitation Covenant
After Termination of Employment

• Description of products or services
  – No express reference to types of products or services considered to be competitive is required in order for non-solicit to be enforceable
  – Any reference to a prohibition against soliciting or attempting to solicit business from customers is adequate and narrowly construed to apply only to
    • Employer’s customers and actively sought prospective customers with whom Employee had Material Contact and
    • Products and services that are competitive with those provided by Employer

OCGA § 13-8-53(b)
Non-Solicitation Covenant
After Termination of Employment

• No express reference to a geographic area is required in order for non-solicit to be enforceable

OCGA § 13-8-53(b)
COURT ENFORCEMENT

- Person seeking enforcement must plead and prove one or more legitimate business interests justifying the covenant
- Once person seeking enforcement makes prima facie showing that covenant complies with statute, then opposing party has burden of establishing that it does not comply with statute or that it “unreasonable”

OCSA §13-8-55
COURT ENFORCEMENT

- Any restrictive covenant not in compliance with statute is unlawful, void and unenforceable
- Court may “modify” unlawful covenant as long as the modification does not render it more restrictive
- Court shall construe covenant:
  - Comport with reasonable intent and expectations of the parties
  - In favor of providing reasonable protection to all Legitimate Business Interests of person seeking enforcement
COURT ENFORCEMENT

• If covenant not in compliance with Georgia statute, Court “may” modify the restraint and grant only the relief “necessary” to
  – Protect all legitimate business interest of person seeking enforcement and
  – Achieve the original intent of the contracting parties to the extent possible

OCGA §§13-8-53(d) and 13-8-54
COURT ENFORCEMENT

• “Modification” is defined as “limitation” of a restrictive covenant to make it “reasonable in light of the circumstances in which it was made” which includes
  – Severing or removing part that would otherwise render entire covenant unenforceable; and
  – Enforcing provisions of restrictive covenant that are reasonable.

OCGA § 13-8-51(11)
COURT ENFORCEMENT

- When Court determines reasonableness of restraint between Employer and Employee, it may consider the “economic hardship” imposed upon the Employee
- Court may not consider economic hardship in other restrictive covenants

OCGA § 13-8-58(d)
NDAs AND TRADE SECRETS

- No time limitation is required to maintain information as confidential or trade secret “for so long as such material remains confidential or a trade secret”
- No geographic area within which such information must be kept confidential or a trade secret is required

OCGA § 13-8-53(e)