

THE NEW LAW OF NON-COMPETE

Written by Charles Y. Hoff and Joe White

You may have heard someone lament, or perhaps you yourself have lamented, that “a non-compete agreement isn’t worth the paper it’s written on.” Before November 2, 2010, that was a fair—if perhaps slightly exaggerated—assessment of the state of Georgia non-compete law. Georgia courts strictly scrutinized non-compete agreements and struck down in their entirety those agreements which were overly broad in any respect. Generally speaking, if an agreement contained a single restriction that was too expansive in its duration, geographic scope, or in the type of activity it prohibited, a Georgia court would invalidate the whole agreement, leaving the employer completely unprotected. In short, Georgia non-competes were presumptively unenforceable; it was only the rare, very carefully drafted agreement that survived judicial scrutiny.

That all changed on November 2, 2010. On that date, Georgia voters ratified House Bill 173, a law intended to loosen Georgia non-compete law and make it easier for Georgia employers to enforce those agreements. Below is a list of important points that Georgia employers should know about HB 173 as it pertains to non-compete agreements.

- **The Law Looks Forward, Not Backwards.** The new law is proactive, not retroactive. It applies only to non-competes signed after November 3, 2010. The older, stricter rules apply to non-competes signed before that date. That places the onus on employers to sign new agreements with key and incoming employees.
- **The Law Scraps the “All or Nothing” Approach.** Under the old rules, Georgia courts struck down in their entirety non-compete agreements that were overly broad in any particular. The new law gives Georgia courts authority to adjust overly broad non-competes to make them enforceable. Courts can either ignore overly broad provisions or enforce them only to the extent they are reasonable.¹ This change is the most significant one; it lowers the stakes for employers to get it perfect the first time.
- **No “Gotcha” for an Overly Broad Restriction.** Under the old rules, non-competes had to be reasonably restricted in their geographic scope and in the scope of activities they prohibited, and the reasonableness of those activities was judged from the date the agreement was signed—not the date the employee was terminated. Generally speaking, non-competes could only restrict employees from competing in the geographic areas where they actually worked and from engaging in competitive activities of the specific type that

¹ O.C.G.A. §§ 13-8-51 (11-12), 13-8-53(d), 13-8-54(b).

they actually performed. The law required specificity, and if the employer got it wrong—*e.g.*, by including a county where the employer did business but the employee never worked, or by including a service that the employer offered but the employee never performed—the agreement would fail in its entirety. The new rules do away with this. Now, Georgia courts will enforce a non-compete if it gives “fair notice of the maximum reasonable scope of the restraint . . . even if the description is generalized or could possibly be stated more narrowly to exclude extraneous matters.”² The law also gives employers a safe harbor for “any good faith estimate of the activities, products, services, or geographic areas, that may be applicable at the time of termination.”³

- **An Employee May Not Serve Two Masters.** Under the old rules, Georgia courts treated all non-compete agreements the same, whether they sought to restrict competitive activities during employment or after employment. While employers often exercised care to reasonably limit restrictions on post-employment competition, they too often included provisions that broadly restricted competition during employment, *e.g.*, “you will not compete during the term of your employment.” Such an overly broad provision could invalidate an entire non-compete agreement. HB 173 corrects this. It provides that a provision which restricts competition during employment “shall not be considered unreasonable because it lacks any specific limitation on the scope of activity, duration, or geographic area as long as it promotes or protects the purpose or subject matter of the agreement or relationship or deters any conflict of interest.”⁴

These are only some of the changes that the ratification of HB 173 brought. The law also loosened the rules regarding non-solicitation and non-disclosure provisions, but those changes are beyond the scope of this article. Georgia employers would be well-advised to consult with counsel to make appropriate changes to all of their restrictive covenant agreements with current employees and new hires.

² O.C.G.A. §§ 13-8-53(c)(1).

³ *Id.*

⁴ O.C.G.A. § 13-8-56(4).