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Georgia Courts Upend Years of Lax Employee Restrictive Covenant Drafting

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After a long hiatus, Georgia courts are again cracking down on employee non-compete agreements and other restrictive covenants. These decisions deserve the attention of every Georgia employer that issues these agreements to its employees.

Three holdings have been handed down by the Georgia Supreme Court and Court of Appeals: (1) employee non-solicitation provisions must include geographic limitations; (2) Georgia courts will alter restrictive covenants only by "striking" overbroad provisions, **not** by adding or altering their terms; and (3) Georgia courts will not enforce another state's choice of law provision to get around these and other requirements if the covenants couldn't first pass muster under Georgia law.

These decisions serve as a much-needed reminder that Georgia remains hostile to employee restrictive covenants and that the 2011 state constitutional amendment allowing them to be issued will be strictly construed.

Employee Non-Solicitation Provisions Must Be Geographically Limited

The Georgia Court of Appeals' recent holding that employee non-poaching provisions must be geographically limited undermines the almost-all-existing employee non-solicitation provisions. Lawyers and employers had long understood that employee and customer non-solicitation provisions could be treated the same. This is no longer true.

Now, while **customer** non-solicitation provisions need not include an express geographic limitation, **employee** non-solicitation clauses must include an "express reference to geographic area." Consequently, these provisions must be reviewed and, likely, rewritten. When doing so, employers should be mindful of the fact that, if this geography is drafted too broadly, Georgia courts will strike the entire provision as opposed to rewriting it.

"Blue Penciling" is Back

The Georgia Court of Appeals has clarified that courts cannot rewrite overbroad restrictive covenants. While they may excise (or blue pencil) certain offending, overbroad language, they may not add or rewrite words to correct an employer's improper restrictions. For example, Georgia courts will treat a non-compete agreement that is missing a time or geographic restriction, or one that sets out an impermissible scope (e.g., four years, or "worldwide") as irretrievably overbroad and thus unenforceable. By contrast, a non-competition provision with a geographical reach of "North America, but if found too broad, Georgia, and if still found too broad, Savannah," could, in theory, survive a blue pencil review – if the court were inclined to do so.

Importantly, this blue-pencil declaration impacts **all** employee restrictive covenants, including non-competition, employee non-solicitation, and customer non-solicitation clauses.

No Choice of Law Get-Around

Finally, employers hoping to evade these restrictions by invoking another state's law in a restrictive covenant agreement are out of luck, as the Georgia Supreme Court has reasserted that Georgia courts must first

determine if the covenant is enforceable under Georgia law. If not, Georgia law will apply. In effect, a non-compete agreement that would be stricken under Georgia law cannot avoid that outcome by referencing another state's law.

Key Takeaway

Taken together, these decisions reemphasize Georgia's century-old view that restrictive covenants are disfavored general restraints on trade and may only be enforced when they survive the courts' strict scrutiny. Therefore, employers with Georgia employees are strongly encouraged to consult with employment counsel to determine whether their post-employment restrictions on their employees are valid and, if not, have them revised and reissued at once. If you have any questions about these decisions, please contact David Gevertz, Hannah Elizabeth Jarrells, or any member of the Firm's Labor & Employment Group.