Georgia Employers Must Act Now as Recent Court Decision Potentially Invalidates Most Employee Non-Solicitation Covenants

Insights
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The Georgia Court of Appeals just made it significantly more difficult for employers to enforce employee non-solicitation provisions, which might require you to take immediate action to protect your company's interests in protecting the stability of your workforce. In the Court of Appeals' June 13 decision in *North American Senior Benefits v. Wimmer,* it held that an employee non-solicitation provision must have a territorial limitation in order to pass muster under Georgia's 2011 Restrictive Covenants Act (RCA). Because most traditional employee non-recruitment provisions do not have such clauses, the majority of such restrictions are now unenforceable in Georgia. What do you need to know about this decision – and more importantly, what do you need to do to correct this problem?

Gap in 2011 Law Opens Door for Recent Court Decision

Traditionally, Georgia law was permissive with respect to employee anti-raiding provisions. Even in Georgia's pre-2011 common law regime – which was extremely hostile to restrictive covenants in general – numerous cases set forth that anti-raiding restrictions were subject to lesser degrees of scrutiny than non-compete or customer non-solicitation paragraphs.

The RCA made it significantly easier to enforce covenants, stating that "reasonable restrictive covenants contained in employment and commercial contracts serve the legitimate purpose of protecting legitimate business interests and creating an environment that is favorable to attracting commercial enterprises to Georgia and keeping existing businesses within the state." However, the statute did not explicitly address employee non-solicitation restrictions.

Court Takes Hard Line on Restrictive Covenants

The Court of Appeals picked up on this omission. It noted that employee non-solicitation provisions restrict competition and that the statute holds that "no contract provision that 'restricts competition' can be enforced unless it is 'reasonable in time, geographic area, and scope of prohibited activities.' The non-solicitation-of-employees restrictive covenant before us does not contain an expressly stated geographic area."

The Court of Appeals went on to explain that the RCA exempts two types of provisions from a requirement of a geographic limitation – restrictions on solicitation of customers and use or

requirement of a geographic limitation – restrictions on solicitation of customers and use of disclosure of confidential information – but that those exceptions were not applicable to employee non-recruitment provisions. Finally, the Court of Appeals took a narrow view of the power of courts to modify unenforceable covenants, holding that the trial court did not have the power to add a territorial limitation to the covenant.

The Upshot for Georgia Employers

The lesson for employers with operations in Georgia is clear: **you need to have your employees sign new restrictive covenant agreements wherein the employee non-solicitation provision has a geographic limitation (or at least amendments making this change to existing agreements).**

This is not as hard to do in Georgia as it would be in other states, as Georgia does not require you to provide new consideration for existing at-will employees (above and beyond continued employment) to sign a restrictive covenant agreement as some other states do. In simpler terms, an employer can make signing a new agreement a term of continued employment; it does not need to pay employees for new agreements.

Additionally, employee non-recruitment provisions have become increasingly salient in recent years as the importance of retaining talent has risen in a tight labor market. Litigation involving solicitation of employees – especially mass raiding cases involving large number of employees moving between competitors – is more common, so having enforceable anti-raiding provisions is vital.

What's Next?

It is possible that the Georgia Legislature will amend the RCA to address the issue identified by the Court of Appeals. Likewise, it is possible that the Georgia Supreme Court will overrule *Wimmer* or another panel of appellate judges will issue a contrary opinion. It may be that the plaintiff in *Wimmer* did not make the correct arguments as to whether the RCA requires territorial limitations in non-recruitment provisions.

However, you can't count on any of these situations occurring. Prudent employers with operations in Georgia should considering modifying their restrictive covenant agreements to add a territorial limitation to their anti-raiding paragraphs so as to ensure that they remain enforceable.

Fisher Phillips will continue to monitor the situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. If you have further questions, contact your Fisher Phillips attorney, the author of this Insight, any attorney in our Atlanta office, or any attorney in our Employee Defection and Trade Secrets Practice Group.

Related People

Michael P. Elkon
Partner
404.240.5849
Email

Service Focus

Employee Defection and Trade Secrets

Related Offices

Atlanta