Georgia Court Limits Non-Solicitation Agreements

Insights
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A recent decision by the Georgia Court of Appeals concerning restrictive covenant agreements (such as non-compete agreements and non-solicitation of customer agreements), may make enforcement of even recently drafted agreements much more difficult. In light of this decision, it may be wise to consider revising your restrictive covenant agreements which apply to Georgia employees. *Trujillo v. Great Southern Equipment Sales.*

Background
Georgia restrictive covenant law generally permits agreements which prohibit an employee from soliciting similar business from customers for a reasonable time period after employment ends. The group of customers usually needs to be limited to those within the geographic area serviced by the employee (e.g. a county list, or radius), or alternatively, needs to be limited to those customers with which the employee had material contact.

It is clear in Georgia that limiting a restriction to only those customers with which the employee has meaningful direct personal contact is lawful. Likewise, because Georgia courts have repeatedly held that an employer has a legitimate business interest in prohibiting ex-employees from using confidential customer information, it had long appeared that a restriction which also extends to customers about which the employee had material confidential information would likewise be enforceable.

For example, if a behind-the-scenes employee were extensively involved in preparing a detailed customer proposal, the employer would still have a legitimate business interest in keeping that employee from soliciting that customer on behalf of a new employer, even if the employee had not previously had direct face-to-face contact with the customer.

Thus, in order to obtain better protection for clients, many restrictions in Georgia (including many drafted by this law firm) have sought to prohibit employees from calling on not only the customers they personally contacted, but also to prohibit them from calling on customers about which they obtained confidential information, customers which they supervised, or customers on which they earned commissions.

This new decision threatens this longstanding practice.

The Court's Ruling

Sarah Trujillo, a sales employee claimed that her customer non-solicitation provision was unenforceable under Georgia law because it extended beyond just the customers she personally contacted, and included customers about whom "the Employee had confidential or proprietary information because of his/her position with Employer." The Georgia Court of Appeals found that this restriction was overbroad and invalid.

The *Trujillo* court explained, "given that the non-solicitation provision at issue here did not limit the prohibition to only customers with whom Trujillo had contact and did not contain a territorial restriction, the provision was overbroad and unenforceable." The *Trujillo* court further objected to the restriction because an employer could give an employee confidential information on all of its customers, and thereby unreasonably expand the restrictions on the employee.

It is not clear to what extent other Georgia courts will follow the *Trujillo* decision. The decision seems to recognize on the one hand that confidential information is a legitimate business interest, but then on the other hand takes away one of the few practical tools for protecting such information. Further, several other Georgia cases have found or suggested that customer non-solicitation restrictions can extend to customers where the employee was involved in the business relationship, or for which the employee performed work, even if there was no personal direct contact with the customer.

Nevertheless, what is clear is that if your company's restrictive covenants contain language extending to customers beyond those with which the employee has personal contact, it is now going to be much more of an uphill battle to enforce such restrictions. Note too that because Georgia is an "all or nothing" state, a court will not simply rewrite or strike through this language and save the rest of your agreement the invalidity of a customer non-solicitation restriction will likely invalidate any non-competition restrictions in the same agreement as well.

Your Options

Georgia employers have three primary choices after *Trujillo.* First, an employer may continue to use restrictions which extend to customers beyond those with which the employee had personal contact; but if litigation ensues, such an employer will then face the burden of convincing a court that the *Trujillo* decision is wrong.

Second, an employer could accept *Trujillo* as an accurate statement of the law, and reduce the restrictions in non-compete agreements, so that they apply only to customers with which the employee had direct personal contact. This may significantly narrow the protection afforded to the employer, particularly in industries where employees or even managers have extensive customer knowledge, even if they are not the primary face-to-face contact.

Third, the employer can choose to redraft its restrictions to address some of the concerns in Trujillo and/or to make the restrictions less comparable to those invalidated in *Trujillo.* For example, a restriction might prohibit an employee from soliciting customers on which the employee provided

restriction might prohibit an employee from soliciting customers on which the employee provided material assistance and about which the employee received confidential competitive information. This would still extend the restriction to some customers that the employee did not have personal contact with (arguably impermissible under *Trujillo*, but supported by some other cases), but would not be subject to the specific objection expressed in *Trujillo* that the employer could unfairly expand the covenant just by handing the employee confidential information.

Which course is right for you depends on the nature of your industry, and the extent to which you are adequately protected by an employee restriction limited solely to those customers with which the employee had contact.

If you would like to discuss these issues further, or if we can provide any guidance or assistance in redrafting your restrictions, please contact your regular Fisher Phillips attorney, or call on any attorney in the Atlanta office of our firm at 404.231.1400.

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