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BRIEFING ON INFORMATION TECHNOLOGY LAW

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NONSOLICITATION COVENANTS IN EMPLOYMENT AGREEMENTS

Part Two of a Three Part Series²

I. Refresher on Restrictive Covenants

As was discussed in Part One of this series, in the absence of a contract providing otherwise, an employee is free to leave an employer at any time and set up a competing business, and to solicit customers of the former employer and hire former coworkers to serve these customers. To prevent this from happening, employers may - within very narrow parameters - require their employees to sign agreements preventing them from joining or forming a competing business while taking with them valued customers and employees. Such agreements are known as “restrictive covenants”. In addition to needing the protection of restrictive covenants, many employers are now faced with the prospect of hiring employees who may be subject to restrictive covenants imposed by a former employer.

Although the Georgia courts generally disfavor restrictive covenants, they can be enforced if narrowly drawn. As with Covenants Not to Compete, Georgia law will govern the interpretation and enforceability of Covenants Not to Solicit Customers and Covenants Not to Solicit Employees imposed on employees working in Georgia.

This article will address Covenants not to Solicit Customers and Covenants Not to Solicit

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²Part One of this series, which addressed Noncompete Covenants in employment agreements, appeared in September, 1999. Part Three will address Trade Secrets and Nondisclosure Covenants in employment agreements.

Employees³ in general; for specific situations, it is advisable to consult counsel.

II. The Basics of Covenants Not To Solicit Customers

A. Purpose

Generally, the purpose of a Covenant Not to Solicit Customers, or Nonsolicitation of Customers, is to protect the employer against the possibility that a former employee will attempt to obtain business from customers or prospective customers with whom the employee developed business relationships during employment. Nonsolicitations of Customers are particularly useful when the employer's customer base spans a large geographic area which might be too broad to be encompassed by a Noncompete. For example, if the employee has customer contacts throughout the United States, a Noncompete with a restricted territory encompassing the entire United States would probably be deemed over broad by a Georgia court; but a Nonsolicitation of Customers encompassing customers and prospective customers across the United States with whom the employee had contact in connection with the employment might be enforceable.

B. Criteria

Under Georgia law, Nonsolicitations of Customers must be reasonable as to duration, territory and scope. Georgia courts look upon Nonsolicitations of Customers with disfavor; therefore, if the Nonsolicitation of Customers is over broad or otherwise unreasonable, the court will simply refuse to enforce the Nonsolicitation of Customers on the ground that it has the effect of preventing the employee from earning a living, rather than simply protecting the employer's interests. Similarly, a Georgia court may refuse to enforce an overly vague Nonsolicitation of Customers on the ground that the employee cannot be certain what he is prohibited from doing under the Covenant. Georgia courts are not authorized to rewrite or ~~blue pencil~~ an over broad, unreasonable or vague Nonsolicitation of Customers to render it enforceable.

Although some clear parameters exist as to what is considered reasonable, many Nonsolicitations of Customers fall within gray areas in which their enforceability will depend on the employer's and employee's specific circumstances. For this reason, it is important that the attorney drafting the Nonsolicitation of Customers have as much information as possible concerning both the employer's business and the employee's specific responsibilities. It is also important to review and possibly rewrite employment agreements as the employer's business changes, or the employee's responsibilities change, to make sure that the Nonsolicitation of Customers addresses the employer's current needs. In addition, Georgia law

³This article addresses only those Covenants Not to Solicit Customers and Covenants Not to Solicit Employees found in employment agreements and similar contracts. The analysis employed herein may also apply to independent contractor agreements, franchise agreements and - in some respects - partnership agreements. Agreements ancillary to the sale of a business are subject to different analysis beyond the scope of this article.

is constantly changing, as the appellate courts refine the standard for what is a reasonable Nonsolicitation of Customers. Therefore, clients are advised to periodically review employment agreements with counsel to be certain that their form of Nonsolicitation of Customers continues to be enforceable under the current state of the law.

1. Time/Duration

As with Noncompetes, a Nonsolicitation of Customers with a duration of one year to 18 months generally will be enforceable. Some Nonsolicitations of Customers which are otherwise narrowly drawn may be enforceable if of a duration up to three years, if a good reason can be provided for such a long duration. A Nonsolicitation of Customers with a duration longer than three years is unlikely to survive. A good rule of thumb is that the longer the duration, the harder it will be to convince a Georgia court that the duration is necessary to protect the employer's business, and the narrower the scope and geographic territory should be. Since Georgia courts do not blue pencil over broad restrictive covenants, it is important to specify a duration which is only as long as reasonably necessary to protect the employer's business. It may also be useful to provide an explanation of a particularly lengthy duration in the body of the employment agreement, to demonstrate to the court that the employee recognized at the outset that a reasonable basis existed for a lengthy duration.

2. Geographic Territory and Scope

Until the early 1990s, Nonsolicitations of Customers were subject to the same geographic restrictions as Noncompetes. But in W. R. Grace & Company v. Mouyal, the Georgia Supreme Court held that the territory in a Nonsolicitation of Customers could be tied to customers with which the employee had had substantial contact on behalf of the employer. Hence it is now possible to draft a Nonsolicitation of Customers which protects against solicitation of the employer's customers and prospective customers with whom the employee had substantial business contact, regardless of where the customers are located. For example, if the employer has a national clientele and wants to restrict its national service manager from resigning and soliciting business from its customers throughout the United States on behalf of a new employer, the employer can specify that the restriction applies to customers with which this employee had substantial contact on behalf of the employer, while eliminating any specific territorial designation. In effect, the geographic territorial restriction has merged with the scope of the Nonsolicitation of Customers.

There are two keys to the enforceability of a Nonsolicitation of Customers which is tied to customer contact rather than a specified territory. First, such a Nonsolicitation of Customers must encompass only those customers and prospects with which the employee had material contact. In other words, it may not be sufficient for the employee to have simply shaken the customer's hand on a single occasion. Second, the contact must be in the course of the employer's business. It will not be sufficient for the employee to have had contact with the customer outside the business relationship if there was no contact in the business context. For example, a recent decision by the Georgia Court of Appeals held that a Nonsolicitation of Customers which was not restricted to customers contacted in the course of the employer's business was

unenforceable as over broad, because it had the effect of barring solicitation of the employee's friends and neighbors if these people happened to be customers with whom the employee had never had contact in the course of his employment.

It is also possible to restrict solicitation of former customers of the employer, but only for a limited duration. A recent Georgia Court of Appeals decision held that an attempt to prohibit solicitation of former customers who had terminated their relationship with the employer as long as four years before the employee's departure was unenforceably over broad.

Employers are still free to draft a Nonsolicitation of Customers which specifies a geographic territory rather than tie the restriction to customer contact, if they so choose.

3. No Restriction Against Accepting Unsolicited Business From Employer's Customers.

The Nonsolicitation of Customers cannot prohibit the employee from accepting unsolicited business from a customer of the employer. But there will be a question of fact whether the employee solicited the business. Some judges are skeptical of claims that the customer offered unsolicited business to the employee, particularly if there is evidence of customer-employee communications immediately prior to the employee's resignation, and the formation of the new business and performance of services for the customer occurred immediately after the employee's resignation.

III. The Basics of Covenants Not To Solicit Employees

A. Purpose

The purpose of a Covenant Not to Solicit employees, or Nonsolicitation of Employees, is to protect against the possibility that an employee will leave and take other employees with him to a new employer or to start a new business.

B. Criteria

1. Time

Generally a duration of two years or less will be enforced.

2. Territory and Scope

Generally a Nonsolicitation of Employees will restrict the employee from hiring or attempting to hire for another employer (including the former employee) any employee of the former employer, or directly or indirectly causing such employee to leave employment in order to work for another. It is not necessary to

restrict the covenant to other employees with whom the employee has had contact in the course of his employment. As with Nonsolicitations of Customers, the departing employee will be free to accept unsolicited requests for employment from other employees, but there will be a question of fact whether the restricted employee solicited the other employees.

IV. Enforcement of Nonsolicitation Covenants

In the event a Nonsolicitation of Customers or a Nonsolicitation of Employees satisfies all three prongs described in Parts II and III, the former employer may seek to enforce these Covenants against both the employee and the employee's new employer. In particular, the former employer may seek an injunction to prevent the employee from soliciting customers or employees in violation of the Nonsolicitation Covenants, and to prevent the new employer from putting the employee to work in a manner which violates the Nonsolicitation Covenants. In addition, the employer may seek an award for damages arising from the violation of the Nonsolicitation Covenants, with these damages assessable against the employee and, in some circumstances, the new employer.

Next Issue: Nondisclosure/Anti-Piracy Covenants and Trade Secrets