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CONTRACTS Contracts in Partial Restraint of Trade: Restrictive Covenant Act

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CONTRACTS

Contracts in Partial Restraint of Trade: Restrictive Covenant Act

CODE SECTIONS:	
BILL NUMBER:	HB 744
ACT NUMBER:	1377
SUMMARY:	The Act provides that contracts in partial restraint of trade that are reasonable are valid and enforceable. The Act establishes rules for determining whether a restrictive covenant is reasonable and establishes procedures for identification, clarification, and reformulation of such covenants. Courts must enforce restrictive covenants independently of the enforceability of any other covenant, or part of a covenant, contained in a non-compete agreement. A post-employment loss or forfeiture provision conditioned upon the occurrence of subsequent competition does not constitute a restraint of trade and is enforceable regardless of the unenforceability of non-compete covenants contained in the same contract.
EFFECTIVE DATE:	July 1, 1990

History

Covenants not to compete are frequently made in the employment setting.[1] Employers often require certain employees to agree, in writing, not to compete with the employer's business after employment is terminated.[2] Non-compete agreements are also made ancillary to the sale of a business.[3] Restrictive covenants essentially protect the employer

1. *See generally* Blake, *Employment Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960); Comment, *A Fresh Look: Lowering the Mortality Rate of Covenants Not to Compete Ancillary to Employment Contracts and to Sale of Business Contracts in Georgia*, 31 EMORY L.J. 635 (1982).

2. *See, e.g.*, Cobb Family Dentistry v. Reich, 259 Ga. 450, 383 S.E.2d 891 (1989); Specialized Alarm Servs. v. Kauska, 189 Ga. App. 863, 377 S.E.2d 703 (1989).

3. *See, e.g.*, Jenkins v. Jenkins Irrigation, 244 Ga. 95, 259 S.E.2d 47 (1979); Redmond v. Royal Ford, 244 Ga. 711, 261 S.E.2d 585 (1979); Reed v. Eastern Elec. Apparatus Repair Co., 194 Ga. App. 650, 391 S.E.2d 472 (1990).

or buyer's business interests from unfair competition. These agreements also restrain trade, however, because they limit an individual's opportunity to work or to conduct business.

The Georgia Code states that a contract that operates as a general restraint of trade is against public policy.[4] The Georgia Constitution declares that contracts that have the effect of defeating or lessening competition are unlawful and unenforceable.[5] The constitutional and statutory provisions do not, however, impose an absolute bar against every form of restrictive covenant.[6] Covenants made in the employment setting or ancillary to the sale of a business are usually regarded as partial, as opposed to general, restraints of trade.[7]

Restrictive covenants made in these two contexts have traditionally been afforded different treatment by Georgia courts. Restrictive covenants between employers and employees are enforced if they are reasonable in duration, territorial limitation, and scope of the proscribed business activity.[8] The courts enforce covenants made ancillary to the sale of a business to the extent necessary to protect the buyer's business interests.[9] Georgia courts did not "blue pencil" restrictive covenants made between an employee and employer.[10] "Blue penciling" allows a court to sever the portions of a contract that are unreasonable or overbroad.[11] Absent "blue penciling," if a portion of a restrictive covenant is unreasonable or overbroad, the entire covenant is deemed void.[12] The

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4. O.C.G.A. § 13-8-2 (Supp. 1990); *see also* Porubiansky v. Emory Univ., 156 Ga. App. 602, 275 S.E.2d 163 (1980) (the General Assembly must declare that a type of contract is against public policy before it can be declared void).

5. 1983 GA. CONST., art III, § VI.

6. *See* Howard Schultz & Assoc. v. Broniec, 239 Ga. 181, 183, 236 S.E.2d 265, 267 (1977) ("Georgia courts have consistently held that the [constitutional and statutory] prohibition does not impose an absolute bar against every kind of restrictive agreement.").

7. *See, e.g.*, Orkin Exterminating Co. v. Walker, 251 Ga. 536, 307 S.E.2d 914 (1983), and Orkin Exterminating Co. v. Pelfrey, 237 Ga. 284, 227 S.E.2d 251 (1976) ("covenants against competition contained in employment contracts are considered in partial restraint of trade").

8. *See, e.g.*, National Teen-Ager Co. v. Scarborough, 254 Ga. 467, 330 S.E.2d 711 (1985); Orkin Exterminating Co. v. Walker, 251 Ga. 536, 307 S.E.2d 914 (1983); Howard Schultz & Assoc. v. Broniec, 239 Ga. 181, 236 S.E.2d 265 (1977).

9. *See, e.g.*, Jenkins v. Jenkins Irrigation, 244 Ga. 95, 101, 259 S.E.2d 47, 51—52 (1979) ("[W]hen it becomes necessary for a superior court to prescribe the territory ... it should only be such area as is shown by the buyer ... to be essential (as opposed to reasonably necessary) for the protection of his interests.").

10. *See, e.g.*, Koger Properties v. Adams-Cates Co., 247 Ga. 68, 274 S.E.2d 329 (1981); Rita Personnel Servs. v. Kot, 229 Ga. 314, 191 S.E.2d 79 (1972); *and* Jarrett v. Hamilton, 179 Ga. App. 422, 346 S.E.2d 873 (1986) (Georgia rejects "blue-pencil" theory of severability in employee non-compete covenants).

11. *See, e.g.*, Jenkins v. Jenkins Irrigation, 244 Ga. 95, 259 S.E.2d 47 (1979).

12. *See* Dothan Aviation Corp. v. Miller, 620 F.2d 504, 507 (5th Cir. 1980) (under Georgia law, the "blue-pencil" theory of severability may not be applied to restrictive covenants ancillary to employment contracts; such contracts "should be enforced as

courts did, however, "blue pencil" restrictive covenants made ancillary to the sale of a business.[13]

In 1984, the Corporate and Banking Law Section of the State Bar of Georgia addressed the topic of restrictive covenants.[14] The section focused on judicial treatment and enforcement of these agreements. The section concluded that Georgia law in this area "had been hobbled by a complex set of judicial rules that frequently yielded unpredictable or arbitrary decisions."[15] The consensus was that the courts had developed inflexible standards to determine whether an agreement was reasonable, and therefore, enforceable.[16] The Bar committee suggested that a simpler approach to restrictive covenants be developed, which "adher[ed] more closely to a reasonableness standard."[17]

HB 744

Legislation was drafted to address the inconsistent decisions and resultant problems in the area of restrictive covenants.[18] A member of the Georgia House of Representatives introduced this draft as HB 744

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written or not at all") (quoting Redmond v. Royal Ford, Inc., 244 Ga. 711, 715, 261 S.E.2d 585, 588 (1979)); Jarrett v. Hamilton, 179 Ga. App. 422, 423, 346 S.E.2d 875, 876 (1986) ("Because Georgia law rejects the "blue-pencil" theory of severability of contracts, if any one of the non-competition clauses is unenforceable because of indefiniteness, over-breadth, or unreasonableness, then the whole agreement must fail.").

13. *See e.g.*, Hamrick v. Kelly, 260 Ga. 307, 392 S.E.2d 518 (1990); Reed v. Eastern Elec. Apparatus Repair Co., 194 Ga. App. 650, 391 S.E.2d 472 (1990).

14. P. Quittmeyer, *Survey of Current Georgia Law Regarding Restrictive Covenants*, 25 GA. ST. B.J. 188, 188 (1989) [hereinafter "Quittmeyer Article"].

15. *Id.*

16. *Id.* For example, the Georgia Supreme Court developed the rule that an agreement must specify with particularity the scope of the business activity being restricted. *See e.g.*, McNeal Group, Inc. v. Restivo, 252 Ga. 112, 311 S.E.2d 831 (1984) (by prohibiting the former employee from working for any employer "in any capacity," the restrictive covenant "failed to specify with particularity the prohibited activities" and therefore was too indefinite to be enforceable). As a result, phrases such as "in any capacity" and "engaging in any business" rendered a restrictive covenant per se void for vagueness. *See, e.g.*, National Settlement Assocs. of Georgia v. Creel, 256 Ga. 329, 349 S.E.2d 177 (1986) (clause prohibiting employee from employment "in any capacity" with competitor declared over-broad); Howard Schultz & Assoc. v. Broniec, 239 Ga. 181, 184, 236 S.E.2d 265, 268 (1977) (agreement "not to accept employment with a competitor 'in any capacity' imposes a greater limitation upon the employee than is necessary for the protection of the employer"). The courts would not construe the language, in the context of the agreement, to find a reasonable application of the phrase.

17. *See* Quittmeyer Article, *supra* note 14.

18. Peter Quittmeyer, a partner of Trotter Smith and Jacobs of Atlanta, helped draft the legislation on the basis of the suggestions of the members of the special committee of the Banking and Finance Section of the Georgia Bar Association, for which he served as reporter. Telephone Interview with Peter Quittmeyer (Apr. 25, 1990) [hereinafter Quittmeyer Interview].

during the 1989 legislative term.[19] The bill was sent to the House Judiciary Committee, but no action was taken on it during the 1989 term.[20]

Early in the 1990 term, the House Judiciary Committee offered a substitute to HB 744.[21] The House approved the committee substitute, and the legislation went to the Senate.[22] The Senate also introduced a version of the bill in 1990.[23] The Senate sponsor of the bill decided to incorporate the Senate version of the bill into the House version rather than pursue a separate bill.[24] The Senate Judiciary Committee offered a substitute to the House committee substitute.[25] The Senate then approved the committee substitute.[26] The House, however, did not approve of the Senate substitute.[27] A Conference Committee was designated to attempt a compromise.[28] The conference committee substitute was then passed by both houses in the final hours of the 1990 term.[29]

The Georgia Restrictive Covenant Act (the Act) supplements and clarifies Code section 13-8-2 relating to contracts contravening public policy.[30] This Code section states that "[a] contract which is against the policy of the law cannot be enforced" and lists examples of contracts that are contrary to public policy.[31] The examples include "[c]ontracts

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19. Denmark Groover introduced the legislation on February 9, 1989. *See* Final Composite Status Sheet, Mar. 15, 1989.

20. The proponents of the bill wanted potential problems with the bill worked out in committee by the time of the 1990 session. Quittmeyer Interview, *supra* note 18.

21. HB 744 (HCS), 1990 Ga. Gen. Assem.

22. Final Composite Status Sheet, Mar. 9, 1990. HB 744 was adopted in the House and first read in the Senate on February 9, 1990. *Id.*

23. *See* SB 667 (as introduced), 1990 Ga. Gen. Assem. Senator C. Donald Johnson sponsored the Senate version of the bill. Telephone Interview with Senator C. Donald Johnson, Senate District No. 47 (June 1, 1990) [hereinafter Johnson Interview]. Rogers Lunsford of the Patent and Trademark Section of the Georgia Bar Association assisted in drafting the Senate bill. *Id.*

24. *Id.*

25. HB 744 (SCS), 1990 Ga. Gen. Assem. The Senate committee substitute was offered on March 5, 1990. *See* Final Composite Status Sheet, Mar. 9, 1990.

26. Final Composite Status Sheet, Mar. 9, 1990.

27. *Id.*

28. *Id.* The conference committee was appointed on March 7, 1990. *Id.*

29. *Id.*

30. *See* O.C.G.A. § 13-8-2(a) (Supp. 1990).

31. O.C.G.A. § 13-8-2(a) states that:

"[c]ontracts deemed contrary to public policy include but are not limited to:
(1) Contracts tending to corrupt legislation or the judiciary;
(2) Contracts in general restraint of trade;
(3) Contracts to evade or oppose the revenue laws of another country;
(4) Wagering contracts;
(5) Contracts of maintenance or champerty."

O.C.G.A. § 13-8-2(a) (Supp. 1990).

in general restraint of trade."[32] The Act puts this in context by distinguishing contracts in partial restraint of trade from contracts in general restraint of trade.[33] Contracts that restrain, in a reasonable manner, a person from exercising any trade, business, or employment are contracts in partial restraint of trade and are not void as against public policy.[34] The Act then describes certain types of restrictive covenants that are reasonable.[35]

The Act addresses non-compete agreements made in connection with the sale of a business and agreements made between an employer and an employee. Restrictive covenants which are otherwise valid are enforceable against individuals who are "sellers," or who are "employees" with "material contacts" with customers.

The Act allows the seller of a business to agree, in writing, not to engage in any activity competitive with the business sold, or to solicit or accept business from customers of the business sold.[36] Any activity, business, or geographic area referred to in the sale-of-business covenant must be described in writing.[37] If it is reasonable to protect the interests of the buyer or the good-will of the business, the covenant may be worldwide and extend for any period of time.[38] If a sale-of-business covenant does not include a specified term of duration, it is considered terminated only when the business is discontinued or either the seller or the buyer "ceases to exist."[39]

The definition of "seller" in the final version of the bill reflects a compromise between the House and Senate.[40] In the final version of

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32. O.C.G.A. § 13-8-2(a)(2) (Supp. 1990).
33. *See id.*
34. O.C.G.A. § 13-8-2.1(a) (Supp. 1990).
35. *See* O.C.G.A. §§ 13-8-2.1(b)—(d) (Supp. 1990).
36. O.C.G.A. §§ 13-8-2.1(b)(2)(A), (B) (Supp. 1990).
37. O.C.G.A. § 13-8-2.1(b)(2) (Supp. 1990).
38. *Id.*
39. O.C.G.A. § 13-8-2.1(b)(2) (Supp. 1990).
40. The House version defined a "seller" as:

> (i) an owner of a controlling interest; or (ii) an executive employee, officer, or manager of the business who receives consideration in connection with either the sale or the sale of business covenant that is worth the equivalent of such person's most recent annual base salary or is in the form of a commitment of continued employment for a period of at least one year; or (iii) an affiliate of a person or entity described in ... (i) or (ii) of this subparagraph.

HB 744 (HCS), 1990 Ga. Gen. Assem.

The Senate version of the bill defined "seller" as:

> (i) an owner of a controlling interest; or (ii) an affiliate of a person or entity described in division (i) of this subparagraph; provided, however, that each sale of business covenant shall be binding only on the person or entity entering into such covenant, its successors-in-interest, and, if so specified in the covenant, any entity that directly or indirectly through one or more

the bill, the term "seller" includes the owner of the controlling interest of a business.[41] It also includes an executive employee, officer, or manager if that individual receives "consideration" in connection with either the sale of the business or with the sale of the business covenant.[42] The Senate version of the bill did not include this second group of individuals in the definition of seller.[43] One senator argued that "employees as employees" should not be covered by post-employment restrictive covenants contained in the sale of business agreement.[44]

The conference committee suggested that the phrase "as a minimum" be added to clarify that the "consideration" received by upper level employees must equal at least one year's base salary or a promise of one year of continued employment, so that only executive employees, officers, and managers who benefited from the sale of the business would be obligated to honor such a non-compete agreement.[45] This change satisfied the Senate members who did not want individuals bound by a non-compete agreement if these individuals did not receive consideration for either the covenant, or the sale of the business.[46] The legislative intent was that de minimis consideration would not be adequate and that the consideration must be related to the non-compete agreement.[47] For example, accrued vacation benefits would presumably not count as consideration for an agreement not to compete.[48]

The Act addresses post-employment covenants, made between an employee and an employer, not to engage in competitive activity, not to solicit customers, and not to recruit employees of a former employer or its affiliates.[49] An agreement not to conduct activity competitive with the employer, upon the employee's termination, is reasonable if it applies to activities the employee conducted for the employer within the geographic area or areas where the employee conducted activities for the employer.[50] The activities must have been conducted either at the time the employee was terminated, or within a reasonable time prior to the employee's termination.[51] The geographic area "in which the employee works" may include any area where the employee conducted,

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intermediaries is controlled by or is under common control of such person or entity.

HB 744 (SCS), 1990 Ga. Gen. Assem.

41. O.C.G.A. § 13-8-1.2(b)(1)(G) (Supp. 1990).
42. *Id.*
43. HB 744 (SCS), 1990 Ga. Gen. Assem.
44. Johnson Interview, *supra* note 23.
45. *Id.*; *see also* HB 744 (CCS), 1990 Ga. Gen. Assem.
46. Johnson Interview, *supra* note 23.
47. *Id.*
48. *Id.*
49. *See* O.C.G.A. §§ 13-8-2.1(c)(2)—(4) (Supp. 1990).
50. O.C.G.A. § 13-8-2.1(c)(2) (Supp. 1990).
51. *Id.*

supervised, or assisted in the employer's operations.[52] Also, any area where there are customers or actively sought prospective customers of the employer's business, with whom the employee had material contacts, may be included in the geographic area "in which the employee works."[53] An agreement not to engage in competitive activity is reasonable if it is for a duration of two years or less.[54]

An employer may request that an employee agree, upon termination of employment, not "to attempt to solicit or accept business" from the employer's customers, either directly or by assisting others.[55] An express reference to a geographic area or to the types of products or services considered competitive is not required for the restraint to be enforceable.[56] This changes Georgia common law. Previously, non-competition clauses prohibiting solicitation were unenforceable if they did not specify a territory.[57] Any reference to a prohibition against "soliciting or accepting business from customers," or similar language, is adequate.[58] A duration of three years or less is reasonable for agreements not to solicit customers.[59]

An employer may also require that an employee agree, in writing, to refrain from recruiting, hiring, or attempting to recruit or hire any other employee of the employer or its affiliates upon the employee's termination.[60] Consistent with the agreement not to solicit customers, an express reference to a geographic area is not required,[61] and a duration of three years is reasonable.[62] The prohibition, however, "shall be narrowly construed to apply only to other employees who are still actively employed by or doing business with the employer or its affiliates at the time of the attempted recruiting or hiring."[63]

The competition, solicitation, and recruiting provisions apply to "employees" as defined by the Act. The House Judiciary Committee substitute definition of "employee" excluded any employee who lacks selective or specialized skills, learning, customer contacts, or abilities.[64]

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52. *Id.*
53. *Id.*
54. O.C.G.A. § 13-8-2.1(c)(6) (Supp. 1990).
55. O.C.G.A. § 13-8-2.1(c)(3) (Supp. 1990).
56. *Id.*
57. *See, e.g.*, Specialized Alarm Servs. v. Kauska, 189 Ga. App. 863, 377 S.E.2d 703 (1989); Guffey v. Shelnut & Assoc., 247 Ga. 667, 278 S.E.2d 371 (1981).
58. O.C.G.A. § 13-8-2.1(c)(3) (Supp. 1990). This general reference will be "narrowly construed to apply only to ... customers with whom the employee had material contact and products and services that are competitive with those provided by the employer's business." *Id.*
59. *Id.*
60. O.C.G.A. § 13-8-2.1(c)(4) (Supp. 1990).
61. *Id.*
62. O.C.G.A. § 13-8-2.1(c)(6) (Supp. 1990).
63. *Id.*
64. HB 744 (HCS), 1990 Ga. Gen. Assem.

The House sponsor of the bill conditioned his support of the bill upon incorporation of this exception into the definition of employee;[65] these individuals are excluded from the definition of "employee" in the final version of the bill.[66]

The definition of "employee" in the original version of the bill included any individual in possession of trade secrets or confidential information that is important to the business.[67] The Senate committee substitute deleted "trade secrets" from the definition, and the final version of the bill does not include "trade secrets."[68] The term "trade secrets" was not included in the final version of the bill because the General Assembly wanted to avoid the implication that it was intentionally overlapping HB 744 with the new trade secrets statute,[69] which was also passed during the 1990 session.[70] The legislators wanted the Restrictive Covenant Act to provide an alternative legal remedy to trade secret actions.[71]

The competition and solicitation provisions apply to customers with whom the employee has had "material contact." A "material contact" exists between an employee and each customer or potential customer with whom the employee has dealt, and between an employee and a customer whose dealings with the employer were coordinated or supervised by the employee.[72] A "material contact" also exists when the employee has obtained confidential information about the customer "in the ordinary course of business as a result of the employee's association with the employer."[73] The Senate Judiciary Committee substitute added the phrase "in the ordinary course of business," and this phrase was included in the final version of the bill.[74] This phrase was added to prevent an employer from purposefully exposing an employee to customer lists just to preclude the employee from contacting any customers after the employee has left the business.[75]

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65. Johnson Interview, *supra* note 23.

66. O.C.G.A. § 13-8-2.1(c)(1)(B) (Supp. 1990).

67. HB 744, as introduced, 1990 Ga. Gen. Assem.

68. HB 744 (SCS), 1990 Ga. Gen. Assem.; O.C.G.A. § 13-8-2.1(c)(4) (Supp. 1990).

69. O.C.G.A. §§ 10-1-760 and 767 (Supp. 1990). For a discussion of the 1990 Trade Secrets Act, see Legislative Review, *Selling and Other Trade Practices: Expand Trade Secrets Statute*, 7 GA. ST. U.L. REV. 215 (1990).

70. Quittmeyer Interview, *supra* note 18. *See* §§ O.C.G.A. 10-1-760 and 767 (Supp. 1990).

71. Quittmeyer Interview, *supra* note 18. Additionally, the term "confidential information" includes a broader range of information than "trade secrets" and thus the Act presumably protects the employer from competition in a wider range of circumstances. *Id.*

72. O.C.G.A. § 13-8-2.1(c)(1)(D) (Supp. 1990).

73. *Id.*

74. HB 744 (SCS), 1990 Ga. Gen. Assem.; O.C.G.A. § 13-8-2.1(c)(1)(D)(iii) (Supp. 1990).

75. Quittmeyer Interview, *supra* note 18.

The Senate Judiciary Committee substitute also added another type of customer contact to the list of "material contacts."[76] This contact occurs when the customer "receives products or services authorized by the employer for which the employee receives compensation, commissions, or earnings within two years prior to the date of the employee's termination."[77] The addition was urged by lobbyists for the insurance industry who wanted a particular industry practice to be covered by the Act.[78]

The Act defines "termination" as termination of the employee's employment with the employer — "with or without cause and upon the initiative of either party."[79] The Act permits the court to consider "any possible inequity that results from the discharge of an employee without cause or in violation of a contractual or other legal obligation" in determining a remedy for an alleged violation of a restrictive covenant.[80] Therefore, the court may consider an employee's claim that he or she was discharged "without cause" in a case where no employment contract or state or federal law has been violated.[81] Also, if the restraint as a

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76. HB 744 (SCS), 1990 Ga. Gen. Assem.

77. O.C.G.A. § 13-8-2.1(c)(1)(D) (Supp. 1990).

78. Quittmeyer Interview, *supra* note 18. In the insurance industry, some employees sell products offered by affiliate companies, and the product therefore never passes through the employer. Including this activity as a material contact will ensure that an agreement between these employers and employees who sold such products will be covered by the Act. *Id.*

79. O.C.G.A. § 13-8-2.1(c)(1)(G) (Supp. 1990). The Conference committee added various "terminations" that are excluded from the definition of "discharge of an employee without cause." HB 744, (CCS), 1990 Ga. Gen. Assem. For example, the termination of a partnership agreement, franchise, distributorship or license agreement is not a discharge without cause. O.C.G.A. § 13-8-2.1(c)(1)(G)(i) (Supp. 1990). Also, "sales agent, broker, representative, or supervisor agreements terminated in accordance with the terms of the agreement or upon completion or expiration of the agreement" are not characterized as discharges without cause. *Id.* The discharge without cause defense is not available when these types of agreements are at issue because it is assumed that these agreements are negotiated at arms-length. *See, e.g.*, Watson v. Waffle House, 253 Ga. 671, 672, 324 S.E.2d 175, 177 (1985) (citing White v. Fletcher/Mayo/Assocs., 251 Ga. 203, 303 S.E.2d 746 (1983)) ("contract of employment inherently involves parties of unequal bargaining power . . . [but] a contract for the sale of a business interest is far more likely to be one entered into by parties on equal footing").

80. O.C.G.A. § 13-8-2.1(c)(1)(G) (Supp. 1990).

81. *Id.* Georgia adheres to the employment-at-will doctrine which declares that absent a contractual agreement to the contrary, employer-employee relationships are at the will of either party. *See, e.g.*, Moran v. NAV Servs., 189 Ga. App. 825, 377 S.E.2d 909 (1989) (written employment agreement, which gave no indication of the duration of employment, constituted employment contract that was terminable at will); Swanson v. Lockheed Aircraft Corp., 181 Ga. App. 876, 354 S.E.2d 204 (1987) (employment manual stating that instructor would only be dismissed for serious infractions but which did not specify a definite period of employment did not change the at-will nature of the employment relationship and employee could be discharged at the employer's discretion). An employer may, therefore, discharge an employee for any reason or no reason at all

whole is rendered unreasonable, the court may consider a claim of discharge "without cause" to determine the unenforceability of the restrictive covenant.[82]

The termination provision also states that "any termination that follows the employee's refusal to accept an offer of continued employment on terms and conditions at least as favorable to the employee as those previously in effect" is not without cause.[83] If a terminated employee is entitled to receive compensation or benefits for complying with a restrictive covenant, that employee cannot allege that he or she was discharged without cause to avoid enforcement of the covenant.[84] The Act does not specify the amount of compensation or value of benefits that would satisfy this exception.

The Act also applies to a restrictive covenant that operates during the term of an employment or other business agreement.[85] Such an agreement is not unreasonable merely because it lacks a specific limitation upon the scope of activity, duration, or territory.[86] The agreement is reasonable provided that it "promotes or protects the purpose or subject matter of the agreement or deters any potential conflict of interest."[87] The Act does not define "potential conflict of interest."[88]

A post-employment covenant made prior to the employee's termination applies to "any good faith estimate of the activities, products and services, or areas applicable at the time of termination."[89] This estimate is sufficient even if the estimate could include extraneous activities, products or services, or areas.[90]

Whenever the Act requires a description of activities, products or services, any description that provides "fair notice" of the maximum

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without giving rise to a cause of action against the employer for alleged wrongful termination. *See, e.g.*, Bell v. Stone Mountain Memorial Ass'n, 185 Ga. App. 890, 366 S.E.2d 353 (1988); Miles v. Bibb Country 177 Ga. App. 364, 339 S.E.2d 316 (1985). The motives of the employer in dismissing an at-will employee are immaterial. *See* Miles, 177 Ga. App. at 364, 339 S.E.2d at 317–18 (citing McElroy v. Wilson, 143 Ga. App. 893, 895, 240 S.E.2d 155 (1977); Georgia Power Co. v. Busbin, 242 Ga. 612, 250 S.E.2d 442 (1978)). The Act, however, allows an at-will employee to claim that he or she was discharged "without cause" to avoid enforcement of a restrictive covenant.

82. O.C.G.A. § 13-8-2.1(c)(1)(G) (Supp. 1990).

83. O.C.G.A. § 13-8-2.1(c)(1)(G)(iii) (Supp. 1990).

84. O.C.G.A. § 13-8-2.1(c)(1)(G)(iv) (Supp. 1990) (in cases in which "the employee remains or becomes entitled to receive earnings, commissions, or benefits that serve as compensation, at least in part, for the employee's compliance with the post-termination covenants," that employee is not discharged without cause).

85. O.C.G.A. § 13-8-2.1(d) (Supp. 1990).

86. *Id.*

87. *Id.*

88. *See* O.C.G.A. §§ 13-8-2.1(a)–(g) (Supp. 1990).

89. O.C.G.A. § 13-8-2.1(e)(2) (Supp. 1990).

90. *Id.* The covenant is to be construed "to cover only so much of such estimate as relates to the activities actually conducted, the products and services actually offered, or the areas actually involved within a stated period of time prior to termination." *Id.*

reasonable scope of the restraint is reasonable.[91] This applies "even if the description is generalized or could possibly be stated more narrowly to exclude extraneous matters."[92]

The Act outlines notice procedures for verifying the existence of or clarifying the terms of a restrictive covenant.[93] Any person or entity bound by a restrictive covenant may verify the terms of a covenant by requesting, in writing, a copy of each restraint in effect between the parties.[94] An employee bound by a non-compete agreement can also seek clarification of a restraint believed to be unclear by requesting clarification in a written statement.[95]

The drafters envisioned that this notice provision would be especially useful in a few specific circumstances. First, an employee, who may not remember the terms of an agreement entered into with the employer upon being hired several years earlier, may demand a copy of the agreement from the employer.[96] An employee with an unsigned copy of a contract may also demand that an employer provide a copy of any agreement the employee has signed.[97] Also, before a future or prospective employer becomes involved in a conflict over a non-compete agreement with a former employer, the prospective employer may follow the notice procedures to request identification, clarification, or reformulation of a restrictive covenant.[98] Enforcement of a restraint that was not identified, clarified, or reformulated pursuant to the request is limited, to avoid prejudice to the employment or business interests of the requesting individual.[99]

Any entity benefiting from an existing non-compete agreement may provide the employee or seller bound by the agreement with a clarification or reformulation of the restraint, even where the employee

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91. O.C.G.A. § 13-8-2.1(e)(1) (Supp. 1990).

92. *Id.*

93. O.C.G.A § 13-8-2.1(f)(1) (Supp. 1990). Both forms of the written request should indicate that "demand is made pursuant to Code Section 13-8-2.1(f)(2) ... and requires a response within thirty days." O.C.G.A. § 13-8-2.1(f)(1)(C) (Supp. 1990). The House version of the bill allowed only a ten day response time. The Senate Judiciary Committee substitute and the final version of the bill give the employer thirty days to respond to the verification and clarification requests, in an effort to give employers a more reasonable time frame within which to respond. *Compare* HB 744 (HCS) 1990 Ga. Gen. Assem. *with* HB 744 (SCS), 1990 Ga. Gen. Assem. Delays in mail service, unavailability of management personnel, and the possibility of restricted access to employee files were all cited as reasons to extend the employer response time to thirty days. Quittmeyer Interview, *supra* note 18.

94. O.C.G.A. § 13-8-2.1(f)(1)(A) (Supp. 1990).

95. O.C.G.A. § 13-8-2.1(f)(1)(B) (Supp. 1990).

96. Quittmeyer Interview, *supra* note 18.

97. *Id.*

98. O.C.G.A. § 13-8-2.1(f)(4) (Supp. 1990).

99. *Id.*

or seller does not request the clarification or reformulation.[100] This option is included "[i]n the interest of reducing any unclear or overbroad aspect of the restraint."[101] The clarification or reformulation cannot be broader than the terms of the original restraint.[102] For example, an employer who discovers some minor drafting error in a non-compete agreement at the time of the employee's termination may correct the error, and the agreement will remain binding on the parties.[103] The drafters hoped that this provision would avert litigation over insignificant and immaterial issues.[104]

In deciding how much of an unclear or overbroad restraint should be enforced, the court is to consider whether the entities benefiting from the restraint have failed to respond, or have delayed their response, to the clarification or verification demands.[105] If an employer refused to clarify the restraint, the court could estop that party from enforcing the ambiguous portion of the restraint, or construe the ambiguity in favor of the employee.

The most significant aspect of the Act is the adoption of "blue-penciling."[106] The Act instructs the courts to enforce a restrictive covenant independently of the enforceability of any other covenant or part of the covenant contained in the contract.[107] Partial enforcement is only available, however, if the restraint "is not so clearly unreasonable and overreaching in its terms as to be unconscionable."[108] The court must "enforce so much of the restraint as it determines by a preponderance of the evidence to be necessary to protect the interests of the parties that benefit from the restraint."[109]

A post-employment covenant may provide that any violation of a restrictive covenant "automatically toll[s] and suspend[s] the period of the restraint for the amount of time that the violation continues."[110] Prior to the Act, the pendency of litigation over the enforceability of a restrictive covenant did not automatically toll the restriction period.[111] The Georgia Supreme Court held that the parties to such an agreement could, however, provide for the contingency of litigation in the

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100. O.C.G.A. § 13-8-2.1(f)(3) (Supp. 1990).
101. *Id.*
102. *Id.*
103. Quittmeyer Interview, *supra* note 18.
104. *Id.*
105. O.C.G.A. § 13-8-2.1(f)(4) (Supp. 1990).
106. Johnson Interview, *supra* note 23.
107. O.C.G.A. § 13-8-2.1(g)(1) (Supp. 1990).
108. *Id.*
109. *Id.*
110. O.C.G.A. § 13-8-2.1(c)(5) (Supp. 1990).
111. *See* Wesley-Jessen, Inc. v. Armento, 519 F. Supp. 1352 (N.D. Ga. 1981) (under Georgia law, the pendency of litigation over a non-compete agreement does not automatically toll the running of the non-competition period).

agreement.[112] The employer must seek enforcement of the agreement promptly after discovery of an alleged violation to toll the period of the restraint.[113]

The Act provides that a loss or forfeiture of rights or benefits conditioned upon competition is not a restraint of trade.[114] This is consistent with prior law. Loss or forfeiture provisions are not classified as restraints of trade because individuals bound by such provisions are not actually prohibited from engaging in competitive activity.[115] The individual simply loses or forfeits certain rights or benefits if he or she competes with the former employer.[116]

The Act also specifies that a loss or forfeiture provision is enforceable even if it is part of a contract that contains restrictive covenants determined to be unreasonable or unenforceable restraints of trade.[117] Prior to the Act, in *A.L. Williams & Assocs. v. Faircloth*,[118] the Georgia Supreme Court held that "[i]t would be paradoxical to strike down a covenant as invalid, and at the same time uphold a forfeiture that is conditioned upon a violation of that very covenant."[119] This provision of the Act does not specify whether it applies to loss or forfeiture provisions conditioned expressly upon a violation of a non-competition clause that is unenforceable.[120] The Act does not require an election between enforcing a restrictive covenant or enforcing a loss or forfeiture provision contained in the same contract; both provisions are enforceable.[121]

The Act applies to all remedies sought or granted after the effective date of July 1, 1990.[122] The Act therefore applies to contracts made prior to the effective date if a contractual or equitable remedy is sought after July 1, 1990.

Conclusion

The Georgia Restrictive Covenant Act defines the types of covenants that are reasonable partial restraints of trade. The Act also allows the

112. *See* Coffee Sys. of Atlanta v. Fox, 227 Ga. 602, 182 S.E.2d 109 (1971).
113. O.C.G.A. § 13-8-2.1(c)(5) (Supp. 1990).
114. O.C.G.A. § 13-8-2.1(g)(3) (Supp. 1990).
115. *See, e.g.*, Brown Stove Works v. Kimsey, 119 Ga. App. 453, 167 S.E.2d 693 (1969).
116. *Id.*
117. *See* O.C.G.A. § 13-8-2.1(g)(3) (Supp. 1990).
118. 259 Ga. 767, 386 S.E.2d 151 (1989).
119. *A.L. Williams & Assocs. v. Faircloth*, 259 Ga. at 768, 386 S.E.2d at 153.
120. *See* O.C.G.A. § 13-8-2.1(g)(3) stating that:
> The fact that any such loss or forfeiture provision is contained in the same agreement or contract with an otherwise valid partial restraint of trade shall not impair the validity or enforceability of either such loss or forfeiture provision or such restraint, and the enforcement of either term shall not serve as grounds for delaying or withholding enforcement of the other term, including enforcement by injunctive relief.

121. *Id.*
122. O.C.G.A. § 13-8-2.2 (Supp. 1990).

courts to sever any portion of a restrictive covenant that does not meet the new statutory definition of reasonableness. The legislation is a comprehensive attempt to bring consistency and predictability to this area of contract law in Georgia.

The Georgia Restrictive Covenant Act was declared unconstitutional by the Superior Court of Dekalb County on September 7, 1990.[123] The court held that "[t]he legislature has no power to provide a new definition of what constitutes an illegal restraint of trade under the Georgia constitution." [124] The case has been appealed to Supreme Court of Georgia.

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123. *See* companion cases of Thomas L. Hart v. Jackson & Coker, case # 90-5654-3 1990; Michael W. Lindsey v. Jackson & Coker, case # 90-5661-3 (1990). Two physician search consultants sought a declaratory judgment on the constitutionality of the Act and its applicability to a non-compete agreement made with a former employer. *Id.*

124. *Id.*