

Labor and Employment ADVISORY

May 12, 2011

Governor Signs into Law “New” Restrictive Covenant Changes

On May 11, 2011, Governor Deal signed into law House Bill 30 (“H.B. 30”), finally resolving the debate surrounding the validity and effective date of Georgia’s new statute addressing the enforceability of restrictive covenants (the “Act”). As explained in previous Alston & Bird advisories on [August 26, 2010](#), and [November 3, 2010](#), the Act provides significant guidance regarding the permissible parameters of restrictive covenants in Georgia, including presumptively permissible limits on the scope of such agreements, definition of key terms and the allowance of judicial modification of otherwise unclear or overly broad provisions. Although H.B. 30 makes it clear that the new law applies to all covenants entered into on or after May 11, 2011, questions remain about how to treat those agreements signed during the period of uncertainty following the November 2010 election.

History of the Georgia Restrictive Covenant Act

In 2009, the Georgia General Assembly passed, and Governor Perdue signed into law, House Bill 173 (H.B. 173), an earlier legislative incarnation of the Act. The bill’s validity and effective date, however, were expressly contingent upon the passage of an amendment to the Georgia Constitution to make the law constitutional. Specifically, the bill stated that the law would take effect on the day following ratification of the applicable constitutional amendment at the time of the 2010 general election.

On November 2, 2010, Georgia voters approved the amendment. Following the constitutional amendment’s passage, however, it became apparent that the General Assembly had failed to specify an effective date for the amendment. Therefore, under the Georgia Constitution, the amendment took effect on January 1, 2011, nearly two months *after* the purported November 3, 2010 effective date of H.B. 173. This inconsistency led many to reconsider H.B. 173’s effective date and even led some to question its constitutionality altogether.

H.B. 30 substantially reenacts H.B. 173 and attempts to remove any confusion regarding the Act’s validity and effective date. Specifically, H.B. 30 states that it became effective upon approval by the governor and applies only to contracts entered into on and after such date. In addition to clarifying the effective date of the Act, H.B. 30 contains minor substantive changes to O.C.G.A. § 13-8-56, which now reads that post-employment geographical limitations that include the area in which the employer does business are presumptively reasonable, provided the distance encompassed is reasonable or particular competitors are listed.

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Application to Earlier Restrictive Covenants

Although it is clear that the Act's provisions apply to covenants signed on or after May 11, 2011, it remains unsettled how to interpret covenants that may have been entered into under the earlier version of the Act. Covenants signed before the November 2, 2010 election will undoubtedly be interpreted according to the previous common law rules. Similarly, covenants signed after November 2, 2010, but before January 1, 2011, will also likely be subject to the common law rules because of the delayed effective date of the constitutional amendment. The most uncertainty lies in the period between January 1, 2011, and May 10, 2011.

H.B. 30 specifically states that the reenactment of the Act should not be taken as evidence that the General Assembly believes that H.B. 173 was invalid. The conflicting effective dates of H.B. 173 and the enabling amendment, however, may provide an argument that the Act, as originally enacted in H.B. 173, was unconstitutional in its entirety. If this were the case, it is unclear whether agreements signed during this interim period would be interpreted under the previous common law rules, which were derived from the previous constitutional provision prohibiting contracts in restraint of trade, or under a new set of yet-to-be-developed common law rules that would be derived based on the recent amendment to the Georgia Constitution modifying that prohibition. Thus, until Georgia courts address the issue, employers can only be sure that covenants signed on or after May 11, 2011 will fully enjoy the employer-friendly benefits of the new Act.

For more detailed information on the Act and how it affects employment covenants in Georgia, please see our previous advisories on the topic:

November 3, 2010 – [Voters Amend Georgia Constitution to Permit Employer-Friendly Changes to Restrictive Covenant Law](#)

August 26, 2010 – [Dramatic, Employer-Friendly Changes to Georgia's Restrictive Covenant Law in the Hands of Georgia Voters](#)

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