

Georgia Court of Appeals Invalidates Employee Non-Solicitation Provisions Without Geographic Limits

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Amid the recent backlash to restrictive covenants across the country, a Georgia Court of Appeals has held that employee non-solicitation provisions must include a geographic limit to be enforceable. *North American Senior Benefits v. Wimmer*, No. A23A0162 (June 13, 2023).

Background on Georgia's Restrictive Covenants Standards

In Georgia, restrictive covenants were governed by common law until 2011. Georgia common law was generally hostile to restrictive covenants but was more permissive of anti-raiding restrictions such as employee non-solicitation provisions.

In 2011, Georgia's passage of the Restrictive Covenants Act (RCA) made enforcement of valid restrictive covenants easier than it had been before. The RCA found that valid restrictive covenants serve a legitimate purpose of "protecting legitimate business interests and creating an environment" favorable to attracting and retaining commercial enterprises in the state.

While the RCA made enforcement of valid covenants easier, it also limited the scope of which restrictive covenants are valid. The RCA requires that, to be enforceable, a contract provision that restricts competition must include reasonable limits in time, geographic area, and scope of prohibited activities.

The RCA exempts customer non-solicitation provisions and restrictions on use or disclosure of confidential information from this requirement. However, the statute is silent on employee non-solicitation provisions. Thus, it remained unclear if employee non-solicitation provisions likewise required limits in time, geographic area, and scope of prohibited activities, or if those provisions would remain governed by the common law standard. This has now changed.

Court of Appeals Brings Employee Non-Solicitation Provisions Into RCA

In *Wimmer*, a Georgia Court of Appeals filled in the RCA's silence on employee non-solicitation provisions by holding that employee non-solicitation provisions must have a geographic limit to be enforceable. The court found that employee non-solicitation provisions clearly restrict competition, and therefore must be governed by the RCA. While the RCA exempted customer non-solicitation provisions, the Court of Appeals noted that its failure to exempt employee non-solicitation provisions was evidence that the Georgia General Assembly intended the RCA to cover employee non-solicitation provisions.

The Court of Appeals also rejected arguments by North American Senior Benefits (NASB) that the covenant implied a geographic limit. NASB argued that, since it only had employees in the United States, the restriction had an implied geographic limit of the

United States. The Court of Appeals rejected this argument, explaining the plain meaning of the RCA indicates that, while descriptions of geographic limits “will be read forgivingly,” a description in some form is required. Accordingly, a geographic limit on an employee non-solicitation provision must be set forth explicitly to avoid invalidation of the covenant.

Takeaways

Employers operating in Georgia should review their current restrictive covenant agreements to see whether employee non-solicitation provisions have geographic limitations. If those agreements do not contain geographic limitations, employers may want to consider modifying the agreements to include such limitations.

Jackson Lewis attorneys in the Restrictive Covenants, Trade Secrets and Unfair Competition practice group are available to assist in reviewing and modifying current restrictive covenant agreements.

(Summer law clerk Andrew Haygood contributed significantly to this article.)

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