

Georgia High Court: Implicit Geographic Scope Sufficient for Valid Employee Non-Solicitation Covenant

By Clifford R. Atlas, Todd Van Dyke & Erik J. Winton

October 8, 2024

Meet the Authors



Clifford R. Atlas

(He/Him)

Principal

(212) 545-4017

Clifford.Atlas@jacksonlewis.com



Todd Van Dyke

(He/Him)

Principal

(404) 586-1814

Todd.VanDyke@jacksonlewis.com



The Georgia Supreme Court has held that employee non-solicitation provisions need not contain an express geographic restriction to be enforceable. *North American Senior Benefits v. Wimmer*, No. S23G1146 (Sept. 4, 2024). It also held that they must be reasonable in light of the totality of the circumstances.

Background on Restrictive Covenants Standards

In Georgia, all 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.

Georgia's passage of the Restrictive Covenants Act (RCA) in 2011 made enforcement of valid restrictive covenants easier than it had been before. The legislature 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 expressly 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 whether employee non-solicitation provisions required limits in time, geographic area, and scope of prohibited activities, or whether those provisions would continue to be governed by the common law standard.

Court of Appeals Brings Employee Non-Solicitation Provisions Into RCA

In 2023, a Georgia Court of Appeals answered the RCA's silence on employee non-solicitation provisions by holding that these provisions must include an express geographic limit to be enforceable. The court found that employee non-solicitation provisions clearly restrict competition, and therefore must be governed by the RCA. Further, the RCA's failure to exempt employee non-solicitation provisions was evidence that the Georgia General Assembly intended the RCA to cover these provisions.

Georgia Supreme Court Decision

The Georgia Supreme Court agreed with the Court of Appeals that the RCA governs employee non-solicitation provisions, and therefore requires them to include a geographic restriction. However, it held that such restrictions can be express or implied.



Erik J. Winton

Principal

(617) 367-0025

Erik.Winton@jacksonlewis.com

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The Supreme Court noted that the employee non-solicitation provision at issue could be considered to have an implied geographic scope aligned with the current homes and places of employment of the covered employees. Alternatively, it said, the absence of a geographic area could indicate the intent to give the provision global or universal application.

The Supreme Court explained that to determine whether a employee non-solicitation provision is enforceable, a court must assess whether the provision's geographic scope is reasonable in light of the totality of the circumstances, including but not limited to:

- The total geographic area implicitly encompassed by the provision;
- The business interests justifying the restrictive covenant;
- The nature of the business involved; and
- The time and scope limitations of the covenant.

The Supreme Court remanded the case to the trial court to conduct the required analysis.

Takeaways

Employers operating in Georgia should review their restrictive covenant agreements and consider updating or adding employee non-solicitation provisions with appropriate geographic limitations.

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

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