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Labor and Employment Law

by W. Melvin Haas, III*
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I. INTRODUCTION

This Article surveys recent developments in state statutory and common law that affect labor and employment relations of Georgia employers. Accordingly, it surveys published decisions from the Georgia Court of Appeals and Georgia Supreme Court from June 1, 2005 to May 31, 2006. This Article also highlights specific revisions to the Official Code of Georgia Annotated.


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II. RECENT LEGISLATION

A. Employment Security Law

Without regard to the General Assembly's changes to the "Workers' Compensation" section\(^1\) of the Georgia Labor and Industrial Relations Code ("Labor Code"),\(^2\) the General Assembly passed one significant amendment to the employment security section of the Georgia Labor Code during the survey period. The General Assembly limited the definition of employment for purposes of employment security law by amending Official Code of Georgia Annotated ("O.C.G.A.") section 34-8-35.\(^3\) In doing so, the General Assembly added an additional paragraph to the statute that excludes from the definition of "employment" certain types of "direct sellers."\(^4\) Specifically, the new paragraph excludes from the definition of "employment":

(18) Services performed by a direct seller, provided that:
(A) Such individual:
   (i) Is engaged in the trade or business of selling or soliciting the sale of consumer products, including services or other intangibles, to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis for resale by the buyer or any other person in the home or otherwise than in a permanent retail establishment; or
   (ii) Is engaged in the trade or business of selling or soliciting the sale of consumer products, including services or other intangibles, in the home or otherwise than in a permanent retail establishment;
(B) Substantially all the remuneration, whether or not paid in cash, for the performance of the services described in subparagraph (A) of this paragraph is directly related to sales or other output, including the performance of services, rather than to the number of hours worked; and
(C) The services performed by the individual are performed pursuant to a written contract between such individual and the person for whom the services are performed and such contract provides that the

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individual will not be treated as an employee for federal and state tax purposes.5

The United States Internal Revenue Service has recognized a distinction between such direct sellers and “common retailers” for some time, addressing the issue in IRS Publication 911 and providing that “direct sellers are self-employed.”6 The recent amendment brings Georgia’s labor code into accord with the United States Internal Revenue Code, as it applies to direct sellers.7

While the amendment has not been controversial to date, it does raise a series of questions as to its necessity and clarity. Regarding the necessity of the amendment, it seems intuitive that direct sellers are in business for themselves, and not employees of their respective corporate suppliers. As to clarity, the amendment advances, without apparent explanation, a significantly lower standard of scrutiny for individuals to qualify as direct sellers when compared to the immediately preceding paragraph, which deals with individuals performing services for common carriers.8 Although substantially similar to the definition of direct seller, in order to qualify for exemption from the term employment under O.C.G.A. section 34-8-35(n)(17), individuals performing certain services for common carriers must, inter alia, have “a written contract with the common carrier” that “does not prohibit such individual from the pickup, transportation, or delivery of property for more than one common carrier

5. Id. For example, direct seller representatives such as Amway, Mary Kay, Tastefully Simple, and others would not be considered employed by the respective corporate brands.


You are a direct seller if you meet all the following conditions.
1. You are engaged in one of the following trades or businesses.
   a. Selling or soliciting the sale of consumer products, either—
      i. In a home or other place that is not a permanent retail establishment, or
      ii. To any buyer on a buy-sell basis or a deposit-commission basis for resale in a home or other place that is not a permanent retail establishment.
   b. Delivering or distributing newspapers or shopping news (including any services directly related to that trade or business).
2. Substantially all your pay (whether paid in cash or not) for services described in (1) is directly related to sales or other output (including the performance of services) rather than to the number of hours worked.
3. Your services are performed under a written contract between you and the person for whom you perform the services, and the contract provides that you will not be treated as an employee for federal tax purposes.

Id.


or any other person or entity," and the individual must know that "the work is not covered by the unemployment compensation laws of Georgia."9 The new amendment, however, does not require direct sellers to pass any relatively stringent level of scrutiny.10 Finally, the recent amendment, while seemingly intended to define direct seller, may inspire unintended confusion as to who is a direct seller because the requirements for qualification under the statute may apply to occupations traditionally held to be included under the term "employment."11 For example, an agent for an insurance broker, who would have previously been covered as an "employee," might now be excluded from the unemployment insurance safeguards if he or she works from home.12

B. Immigration Law

The most significant employment legislation passed by the Georgia General Assembly during the survey period was the Georgia Security and Immigration Compliance Act ("the Act"), commonly known by its Senate Bill acronym S.B. 529.13 The Act has been characterized as controversial and far-reaching, with provisions amending seven titles to the O.C.G.A. and creating several short titles.14 The Act seeks to

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10. See Ga. S.B. 486, § 1 (enacting new O.C.G.A. § 34-8-35(n)(18)). There is no requirement that direct sellers be paid exclusively in commissions or for tasks performed, no prohibition on contractual exclusivity, and no emphasis on the direct seller's responsibility for taxes or lack of workers' compensation coverage.
11. Id.
12. This seems to be at odds with the provisions of O.C.G.A. section 34-8-35(f), which places the burden of proof upon the employer to establish that an employee is an independent contractor. O.C.G.A. § 34-8-35(f).
14. Id. The Preamble to S.B. 529 provides:
   To amend Titles 13, 16, 35, 42, 43, 48, and 50 of the Official Code of Georgia Annotated, relating to contracts, crimes and offenses, law enforcement officers and agencies, penal institutions, professions and businesses, revenue and taxation, and state government, respectively, so as to provide for the comprehensive regulation of persons in this state who are not lawfully present in the United States; to provide for a short title; to provide for statutory construction; to provide for definitions; to provide for procedures and requirements applicable to certain contracts or subcontracts; to provide for powers, duties, and authority of the Commissioner of Labor; to provide that it shall be unlawful to traffic a person for labor or sexual servitude; to provide that the commissioner of public safety is authorized and directed to negotiate the terms of a memorandum of understanding between the State of Georgia and the United States Department of Justice or Department of Homeland Security concerning the enforcement of federal
ensure greater control over, and sanctions against, employers who hire persons not authorized to work in the United States.\textsuperscript{15} Three particular provisions directly impact employers, namely: (1) the imposition of criminal sanctions for trafficking a person for labor servitude,\textsuperscript{16} (2) the requirement that entities who contract with the State of Georgia or its political subdivisions register and participate in the federal work authorization program,\textsuperscript{17} and (3) income tax and tax withholding implications associated with the employment of persons not authorized to work in the United States.\textsuperscript{18} Opponents of the Act have threatened to challenge its legality with possible preemption and equal protection litigation.\textsuperscript{19}

\textbf{1. Criminal Sanctions}

The Act adds a new criminal code section to the O.C.G.A. that provides criminal penalties for any person or corporation that "knowingly subjects or maintains another in labor servitude or knowingly recruits, entices, harbors, transports, provides, or obtains by any means another person for the purpose of labor servitude."\textsuperscript{20} The activities that trigger the criminal provisions of the Act are broadly defined. For example, "labor immigration laws and related activities; to provide for a definition; to provide for certain training; to provide for funding; to provide for certain authorized activities by certain peace officers; to provide for valid identification documents; to provide for exceptions; to provide procedures for determining nationality and immigration status of certain persons who are booked into a jail; to provide for the development of guidelines relative to such booking procedures; to provide for the comprehensive regulation of private immigration assistance services; to provide for a short title; to provide a statement of purpose and definitions; to specify conditions under which certain compensation paid by a taxpayer shall be disallowed as a business expense for state income tax purposes; to provide for powers, duties, and authority of the state revenue commissioner; to provide for additional withholding requirements and procedures; to provide for exceptions; to provide for verification of lawful presence requirements, procedures, and conditions regarding applications for certain benefits; to provide for exceptions; to provide for the promulgation of regulations; to provide for criminal and other penalties; to provide for related matters; to provide for effective dates; to provide for applicability; to repeal conflicting laws; and for other purposes.

Preamble to Ga. S.B. 529.

\textsuperscript{15} Ga. S.B. 529.
\textsuperscript{16} \textit{Id.} \textsuperscript{\textsuperscript{1}} § 3 (codified as enacted at O.C.G.A. § 16-5-46(b)).
\textsuperscript{17} \textit{Id.} \textsuperscript{\textsuperscript{2}} § 2 (codified as enacted at O.C.G.A. §§ 13-10-90, -91).
\textsuperscript{18} \textit{Id.} §§ 7, 8 (codified as enacted at O.C.G.A. § 48-7-21.1(a)-(b)).
\textsuperscript{19} Jim Tharpe, \textit{Perdue Signs Bill on Illegals; Crackdown Law Faces Challenges}, ATLANTA J. CONST., Apr. 18, 2006, at 1A.
\textsuperscript{20} Ga. S.B. 529, § 3 (codified as enacted at O.C.G.A. § 16-5-46(b)).
servitude” is defined as “work or service of economic or financial value which is performed or provided by another person and is induced or obtained by coercion or deception.”³¹ “Coercion” and “deception” are also broadly defined under the Act.³² “Coercion” includes any act resulting in bodily harm, threats of bodily harm, restraint, exposing or threatening to expose a person to criminal or immigration proceedings, or confiscating documents.³³ “Deception” includes conduct that is generally considered deceptive, such as creating or confirming another’s false impressions or promising benefits not intended to be delivered.³⁴

The possible penalties for violating the criminal provision are significant. Convicted offenders will be classified as felons.³⁵ The statutory sentencing range varies depending upon the age of the victim.³⁶ Where the victim is over the age of eighteen, the sentence can range from a minimum of one year to a maximum of twenty years.³⁷ For victims under the age of eighteen, the punishment is a minimum of ten years to a maximum of twenty years.³⁸ The Act also specifically allows for the prosecution of a corporate entity when an agent of the corporation, acting within the scope of employment, performs the illegal conduct and that conduct is “authorized, requested, commanded, performed, or within the scope of . . . employment . . . or constitute[s] a pattern of illegal activity that an agent of the company knew or should have known was occurring.”³⁹

2. Federal Work Authorization Program Requirement

The Act amends Title 13 of the O.C.G.A., adding two code sections related to contracts with the State of Georgia or its political subdivisions.⁴⁰ Together, these two code sections specifically prohibit these public entities from entering into contracts in connection with the “physical performance of services” within Georgia unless the contractor or subcontractor is registered and participates in the “federal work

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21. Id. (codified as enacted at O.C.G.A. § 16-5-46(a)(3)).
22. Id. (codified as enacted at O.C.G.A. § 16-5-46(a)(1) to (2)).
23. Id. (codified as amended at O.C.G.A. § 16-5-46(a)(1)(A) to -(D)).
24. Id. (codified as enacted at O.C.G.A. § 16-5-46(a)(2)(A) to (C)).
25. Id. (codified as enacted at O.C.G.A. § 16-5-46(d)).
26. Id.
27. Id.
28. Id.
29. Id. (codified as enacted at O.C.G.A. § 16-5-46(g)).
30. Id. § 2 (codified as enacted at O.C.G.A. §§ 13-10-90, -91).
authorization program” to verify information pertaining to all new employees.31

The term “contractor” is not defined in the Act. However, the Act states that the term “[s]ubcontractor’ includes a subcontractor, contract employee, staffing agency, or any contractor regardless of its tier.”32 Of particular note is the specific inclusion of “contract employees,” which seems to indicate that an individual independent contractor would have to register and participate in the federal work authorization program.33 Also, the inclusion of staffing agencies within the definition of “subcontractor” requires any of these entities supplying workers to public entities on a temporary basis to register and participate in the federal work authorization program as well.34

The Act’s requirement to register and participate in the “[f]ederal work authorization program” is not as clear cut as it may seem.35 The Act defines “[f]ederal work authorization program” as “any of the electronic verification of work authorization programs operated by the United States Department of Homeland Security or any equivalent federal work authorization program operated by the United States Department of Homeland Security to verify information of newly hired employees . . . .”36 Given that the Act has just recently been signed into law, and thus there are no rules or regulations, this provision will likely require participation in the federal employment verification pilot program currently operated by the Department of Homeland Security (“DHS”) entitled “Basic Pilot.”37 Currently, employers may use the Basic Pilot program on a voluntary and free basis.38 The Basic Pilot program started out in five states and has now been expanded to allow participation of employers throughout the United States.39 However,

31. Id.
32. Id. (codified as enacted at O.C.G.A. § 13-10-90(4)).
33. See id.
34. Id.
35. Id. (codified as enacted at O.C.G.A. § 13-10-90(2)).
36. Id.
there has been concern regarding whether DHS will be able to sustain the cost and the infrastructure if participation in the program is greater than expected. In fact, DHS has specifically noted that if significantly more employers than anticipated choose to participate, the program may have to be limited to a certain number of participants. This is especially pertinent because the Act requires use of a viable DHS work authorization program. Presently, Basic Pilot is the only available work authorization program, and it is unknown what effect a significant national increase in Basic Pilot volume may have on the implementation of Georgia's Act. If DHS is unable to meet demand, complying with the Georgia Act would become impossible, and it is unlikely that the Act could be used to punish an employer who could not satisfy the requirements of the Act because of such impossibility. Notwithstanding these considerations, the language of the Act appears to contemplate that the Basic Pilot program will be expanded, enhanced, renamed, or otherwise altered, but that regardless of the disposition of Basic Pilot, any entity that contracts with the state will be required to use whatever program DHS substitutes for Basic Pilot, if any.

i. Registration and Participation. Registration and use of the Basic Pilot program appears to be fairly straightforward. The program is an internet application accessed via a webpage; users simply follow the instructions on the screen to complete the process. The user is required to execute a “Memorandum of Understanding” and will receive a user identification and password. The Basic Pilot program allows an employer to specify an entity DHS refers to as a “Designated Agent” who would perform the actual verification process on its behalf. The Act does not seem to take this into account; it appears to require that the actual contractor or subcontractor register and participate in the program.

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42. See generally Ga. S.B. 529.
43. Id. § 2 (codified as enacted at O.C.G.A. §§ 13-10-90(2), 13-10-91(a), (b)).
45. Id.
46. Id.
47. Ga. S.B. 529, § 2 (codified as enacted at O.C.G.A. § 13-10-91(b)(1), (2)).
Following registration, the user must complete a web-based tutorial on the use of the program, which walks the user through the various steps in the process. The Basic Pilot program is designed to allow the employer to verify the employment eligibility of newly hired employees. The verification of employment query is performed after an employee has been hired and the normal I-9 process has been completed, but must be completed within three business days of the employee's hire date. The system cannot be used to pre-screen applicants for employment. After joining the program, an employer would not be allowed to check the status of existing employees (re-verification).

**ii. Issuance of Rules and Regulations.** The Act grants the Commissioner of the Georgia Department of Labor the authority to promulgate forms, rules, and regulations to administer the Act. Interestingly, the Act alternatively provides that the Commissioner of the Georgia Department of Transportation has the authority to issue forms, rules, and regulations for contracts concerning public transportation. The Act further specifies that these rules and regulations are to be posted on the respective websites of each department.

**iii. Staggered Dates of Implementation.** The Act has staggered dates of implementation, requiring that public employers, contractors, and subcontractors with 500 or more employees must comply with the Act beginning on or after July 1, 2007; those with 100 or more employees must comply by July 1, 2008; and all must be in compliance by July 1, 2009. The staggered implementation dates likely are reflective of the Georgia General Assembly's confidence and expectation that DHS will improve the federal work authorization system to keep up with demand over the course of the two year phase-in period.

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49. Id.
50. Id.
51. Id.
52. Id.
53. Ga. S.B. 529, § 2 (codified as enacted at O.C.G.A. §§ 13-10-91(d), (e)).
54. Id. (codified as enacted at O.C.G.A. § 13-10-91(e)).
55. Id. (codified as enacted at O.C.G.A. §§ 13-10-91(d), (e)). The websites may be accessed as follows: (1) Georgia Department of Labor, http://www.dol.state.ga.us/ and (2) Georgia Department of Transportation, http://www.dot.state.ga.us/.
56. Ga. S.B. 529, § 2 (codified as enacted at O.C.G.A. § 13-10-91(b)(3)).
3. Tax Implications

The Act also amends Title 48 of the O.C.G.A. as it relates to revenue and taxation. The Act provides that on or after January 1, 2008, no wages for labor services of $600 or more may be claimed as a business deduction for state income tax purposes unless the employee is an "authorized employee" in the United States, as defined by federal law. Thus, the Act removes a significant benefit from any employer who chooses not to authorize employees through the Basic Pilot program. Yet, the General Assembly did provide several exceptions. This portion of the Act does not apply to: (1) any business domiciled in Georgia that is exempt from compliance with federal employment verification procedures; (2) any individual hired by the taxpayer prior to January 1, 2008; (3) any taxpayer where the individual being paid is not directly compensated by that taxpayer; or (4) wages paid for labor services to any person who holds and presents to the taxpayer a valid license or identification card issued by the Georgia Department of Driver Services.

Although the Act also provides an exemption for any person who holds and presents a valid license or identification card issued by the Georgia Department of Driver Services, Georgia employers should be cautious to avoid hiring only individuals, or a disproportionate number of individuals, who present these documents. A refusal to hire unless the employee has either a valid license or identification card could lead to liability for I-9 violations. The provision inadvertently, yet inherent-

57. Id. § 7 (codified as enacted at O.C.G.A. § 48-7-21.1).
58. Id. (codified as enacted at O.C.G.A. §§ 48-7-21.1(a), (b)).
59. Id. (codified as enacted at O.C.G.A. § 48-7-21.1(c)).
60. Id. (codified as enacted at O.C.G.A. § 48-7-21.1(d)).
61. Id. (codified as enacted at O.C.G.A. § 48-7-21.1(e)).
62. Id. (codified as enacted at O.C.G.A. § 48-7-21.1(f)).
63. Id.

The Immigration Reform and Control Act of 1986 (IRCA) legally mandates that U.S. employers verify the employment eligibility status of newly-hired employees. IRCA made it unlawful for employers to knowingly hire or continue to employ unauthorized workers. In response to the law, the Immigration and Naturalization Service (INS), now an integrated component of the Department of Homeland Security (DHS), created Form I-9 and mandated its accurate and timely completion by all U.S. employers and their employees.

Id.
ly, encourages "document abuse," which occurs when an employer requests more or different documents than are required to verify employment eligibility and identity, rejects reasonably genuine-looking documents, or specifies certain documents over others. All work-authorized individuals are protected from document abuse. The choice of documents belongs exclusively to the employee.

The passage of S.B. 529 has raised reasonable cause for concern among immigrant workers and employers alike. The implementation of the Act's provisions over the course of the next two years will force many Georgia employers to become more proactive in their approach to immigration compliance. Georgia's working immigrant population will also be forced to become more educated on the new "authorized worker" requirements, while illegal immigrants will likely find it increasingly difficult to find work in Georgia.

III. Employment Law Principles - Case Law

A. Wrongful Termination

1. Employment-at-Will

The doctrine of employment-at-will has two readily identifiable features: first, either the employee or employer may terminate the employment relationship at any time, with or without cause; and second, upon the termination of an employment-at-will contract, the employee is barred from maintaining a wrongful termination claim. Explicitly provided in O.C.G.A. section 34-7-1 is the doctrine of employment-at-will, indicating that unless the parties contract otherwise, employment contracts in Georgia are presumed to be at-will. A large majority of

65. *See generally* Robison Fruit Ranch, Inc. v. United States, 147 F.3d 798, 801-02 (9th Cir. 1998).
67. *Id.* § 1324b(a)(6).
68. *See id.* § 1324a(b) (2000).
70. *Id.*
the states now recognize a public policy exception to the doctrine of employment-at-will.\textsuperscript{71} While the employment-at-will doctrine has significantly eroded in other jurisdictions, it has continued to be practically inviolable in Georgia.\textsuperscript{72}

For example, in \textit{Reid v. City of Albany},\textsuperscript{73} the Georgia Court of Appeals reviewed an employee’s allegation of wrongful termination stemming from the employee reporting his superior’s improper use of city resources.\textsuperscript{74} The trial court dismissed the complaint for failure to state a claim.\textsuperscript{75} On appeal, the plaintiff contended that he was terminated in retaliation for reporting his superior’s wrongful use of city resources and that such termination violated the City’s personnel policies and various state statutes.\textsuperscript{76} In response, the court of appeals wrote:

> Under Georgia law, at-will employees may be terminated for any or no reason, and they generally cannot recover for wrongful discharge. The motivation underlying the termination usually does not matter; an employer may discharge an at-will employee without liability. As noted by our Supreme Court, this bar to wrongful discharge claims in the at-will employment context “is a fundamental statutory rule governing employer-employee relations in Georgia.”\textsuperscript{77}

Moreover, the court of appeals held that “allegations that an at-will employee’s termination violated the employer’s discipline polices do not give rise to a wrongful discharge claim.”\textsuperscript{78}

The court of appeals specifically declined to create a judicial exception to the statutory bar against former at-will employees maintaining wrongful termination claims.\textsuperscript{79} The court noted, “Although there can be public policy exceptions to the [bar against wrongful discharge claims], judicially created exceptions are not favored, and Georgia courts

\textsuperscript{71} Nancy Baumgarten, “Sometimes the Road Less Traveled is Less Traveled For a Reason”: \textit{The Need For Change in Georgia’s Employment-At-Will Doctrine and Refusal to Adopt the Public Policy Exception}, 35 GA. L. REV. 1021, 1025-26 (2001).
\textsuperscript{72} Id. at 1025 (“Georgia and Alabama remain the only two states that still refuse to recognize [a judicially-created public policy] exception to the employment-at-will doctrine.”).
\textsuperscript{73} 276 Ga. App. 171, 622 S.E.2d 875 (2005).
\textsuperscript{74} Id. at 172, 622 S.E.2d at 877.
\textsuperscript{75} Id. at 171, 622 S.E.2d at 876.
\textsuperscript{76} Id. at 171-72, 622 S.E.2d at 877.
\textsuperscript{77} Id. (quoting Reilly v. Alcan Aluminum Corp., 272 Ga. 279, 280, 528 S.E.2d 238, 239-40 (2000)) (footnotes omitted).
\textsuperscript{78} Id. at 172, 622 S.E.2d at 877.
\textsuperscript{79} Id.
thus generally defer to the legislature to create them.\textsuperscript{80} Because the court could not find a legislative public policy exception excluding whistleblowers from employment-at-will in this case, the court of appeals affirmed the trial court's ruling.\textsuperscript{81}

This case is significant because it demonstrates the reluctance of Georgia courts to create public policy exceptions to the doctrine of employment-at-will.\textsuperscript{82} Rather, the Georgia Court of Appeals will defer to the legislature notwithstanding the fact that other jurisdictions create such public policy exceptions.\textsuperscript{83} Thus, it appears that the doctrine of employment-at-will is destined to remain impervious to wrongful termination claims until the Georgia General Assembly creates an applicable exception.

2. Duration Terms and Employment-at-Will

Employment contracts in Georgia are presumed to be at-will unless the parties contract otherwise.\textsuperscript{84} This means that in the absence of a specified length of employment, an employment-at-will relationship is created.\textsuperscript{85} Contract provisions specifying "permanent employment, employment for life, or employment until retirement" are per se indefinite, and are therefore employment-at-will contracts.\textsuperscript{86} For example, in \textit{Taylor v. Calvary Baptist Temple}, a teacher formerly employed by a private school sued the school and its principal, alleging breach of his employment contract. The trial court granted summary judgment in favor of the school, and the teacher appealed.\textsuperscript{87} On appeal, the teacher argued that his contract had a one-year term because his contract provided, "[A]lthough there are 187 working days, 'e]mployment is based upon a twelve month's pay system. Employees will be paid the yearly salary agreed upon in twelve equal monthly payments . . . ".\textsuperscript{88} Specifically, the former employee relied on O.G.C.A. section

\begin{itemize}
  \item \textit{Id.} at 172 n.9, 622 S.E.2d at 878 n.9 (quoting Reilly, 272 Ga. at 280, 528 S.E.2d at 239-40).
  \item \textit{Id.} at 172, 622 S.E.2d at 877.
  \item \textit{Id.} at 172 n.9, 622 S.E.2d at 878 n.9 (quoting Reilly, 272 Ga. at 280, 528 S.E.2d at 239-40).
  \item \textit{Id.}
  \item O.C.G.A. § 34-7-1.
  \item See generally WIMBERLY, supra note 68, at 20-21.
  \item \textit{Id.} at 71, 630 S.E.2d at 605.
  \item \textit{Id.} at 72, 630 S.E.2d at 605.
\end{itemize}
34-7-1, which states, "'If a contract of employment provides that wages are payable at a stipulated period, the presumption shall arise that the hiring is for such period . . . '."

The Georgia Court of Appeals rejected the teacher's arguments, pointing out that any presumption of duration was rebutted by language in the contract that specifically provided "all employees are hired 'At Will,'" and that "'[s]hould employment be terminated prior to the end of the school year, the termination pay will be prorated on the number of days worked . . . .'" Also, the court noted that the statement the teacher relied upon referred only to a twelve-month "pay system," not a contractual obligation to pay the teacher for a stipulated period of twelve months. Accordingly, the court of appeals held that the contract was unambiguous in creating an employment-at-will agreement, and thus, the school was authorized to terminate the teacher with or without cause.

The Georgia Court of Appeals reached a similar decision in Jenkins v. Georgia Department of Corrections. In that case, Jenkins, a former Georgia Department of Corrections employee, sued the department for breach of contract after terminating him despite an oral promise of employment for "'as long as he wanted.'" The language that Jenkins relied on was part of an earlier settlement agreement reached between the litigants. The trial court granted the Department of Corrections's motion to dismiss, and Jenkins appealed. Although Jenkins's original complaint did not allege fraud against the Department of Corrections, Jenkins asserted on appeal that he was fraudulently induced to sign the settlement agreement by the oral promise of permanent employment.

Turning first to the status of Jenkins's employment, the court of appeals conceded that the settlement agreement could be interpreted as an employment contract. The court went on to hold, however, that because the agreement did not contain any contractual language specifying a time frame of employment, the employment was presumed to be at-will. Accordingly, the employment relationship could be

90. Id. at 71, 630 S.E.2d at 605 (quoting O.C.G.A. § 34-7-1) (omission in original).
91. Id. at 72, 630 S.E.2d at 605-06.
92. Id.
93. Id. at 71, 630 S.E.2d at 605.
95. Id. at 160-61, 630 S.E.2d at 655.
96. Id. at 161, 630 S.E.2d at 655.
97. Id., 630 S.E.2d at 655-56.
98. Id., 630 S.E.2d at 655.
99. Id., 630 S.E.2d at 655-56.
terminated by either party for any reason. Furthermore, the court of appeals deemed Jenkins's fraud argument unpersuasive, stating: "It is well settled that in the absence of a controlling contract, an oral promise of 'permanent employment' or 'employment for life' is unenforceable and gives rise to no cause of action against an employer for wrongful termination." Moreover, the court noted in dicta that "[f]raud cannot be predicated on a promise which is unenforceable at the time it is made . . . [P]romises of lifetime employment upon which the promisee relies for establishing fraud were unenforceable even absent any fraud at the time of their utterance."

These cases indicate Georgia courts' unwillingness to allow the doctrine of employment-at-will to be eroded by ambiguous agreements. An employment contract will continue to be presumed at-will unless specified time frames are written into such a contract.

3. Quantum Meruit

In *Fay v. Custom One Homes, LLC*, the Georgia Court of Appeals allowed recovery of the value of services rendered, notwithstanding an employee being barred from maintaining a wrongful termination claim by the doctrine of employment-at-will. Fay was the president of Custom One Homes, LLC ("Custom One"). After being evicted from its offices, Custom One began building its own office building, and it put Fay in charge of the project as the general contractor. Evidence indicated that the CEO of Custom One orally contracted with Fay by

100. *Id.*, 630 S.E.2d at 656.
102. *Jenkins*, 279 Ga. App. at 162, 630 S.E.2d at 656; *see also* WIMBERLY, supra note 68, at 21 ("[E]ven if an employer's policy is considered as a contract, it is terminable at will unless it specifies a period of employment")
105. *Id.* at 192-93, 622 S.E.2d at 874.
agreeing to give him a twenty or thirty percent stake in the office building or the holding company that owned the office building as compensation for a job well done. Subsequently, Fay was terminated, and the parties could not come to an agreement on the value of his stake in the office building or holding company. When negotiations failed, Fay filed suit in quantum meruit for the value of services rendered in excess of his job as president of Custom One.106 The trial court found that Fay's "status as 'an at-will salaried employee' precluded [his] recovery in quantum meruit."107 Consequently, it granted summary judgment in favor of Custom One, and Fay appealed.108

On appeal, the Georgia Court of Appeals held that the trial court erred in granting summary judgment on Fay's quantum meruit claim.109 The court of appeals noted, "In Georgia, the reasonable value of extra work performed outside the scope of one's job duties can be recovered in quantum meruit."110

B. Torts Associated With Employment

1. Negligent Hiring and Retention

The theories of negligent hiring and negligent retention are closely related and are established by virtually the same elements. The distinction between the theories of negligent hiring and negligent retention is that an employer negligently hires a dangerous employee in the former, whereas the employer negligently retains a dangerous employee in the latter.111 Employees and third parties may make claims for negligent hiring, negligent retention, or both.112 Georgia case law and the Georgia Code establish that a claim of negligent hiring or retention requires that (1) the employer knew, or should have known in the course of ordinary care, that the employee was incompetent, and (2) such incompetence was the direct and proximate cause of damage to the complaining party under color of the employee's employment or during the employee's work hours.113

106. Id. at 190, 622 S.E.2d at 872.
107. Id. at 192, 622 S.E.2d at 874.
108. Id. at 190, 622 S.E.2d at 872.
109. Id. at 192, 622 S.E.2d at 874.
110. Id. at 193, 622 S.E.2d at 874.
111. Wimberly, supra note 68, at 391.
112. Id.
113. Id. at 391-93. But see TGM Ashley Lakes, Inc., v. Jennings, 264 Ga. App. 456, 462, 590 S.E.2d 807, 815 (2003) (holding that negligent hiring or retention may be applicable to torts committed by employees outside the scope of their employment where
In Poole v. North Georgia Conference of the Methodist Church, Inc., a pastor was accused of maintaining a clandestine sexual relationship with a parishioner’s wife while simultaneously counseling the parishioner on his marital problems. The parishioner brought an action against the church and pastor seeking damages for negligent hiring and retention arising out of the alleged breach of confidential relationship. The trial court granted the defendant's motion for summary judgment and the parishioner appealed. On appeal, the Georgia Court of Appeals affirmed the lower court, holding that the parishioner did not establish a negligent hiring or retention claim because he failed to show that the church knew or should have known, in the ordinary course of care, that the pastor was not suited for the particular employment prior to the alleged tort. Evidence showed that the pastor was interviewed by the District Committee of Ordained Ministry and then by the Conference Board of Ordained Ministry, and finally, psychologically evaluated by a psychologist with the Emory School of Medicine prior to being hired. None of the evaluative bodies indicated that the pastor was unfit for service. Relying on a fundamental element of negligent hiring and retention, the court of appeals wrote, “[A]n employer may be held liable only where there is sufficient evidence to establish that the employer reasonably knew or should have known of an employee’s ‘tendencies’ to engage in certain behavior relevant to the injuries allegedly incurred by the plaintiff.”

2. Respondeat Superior, Authorization, and Ratification

The term “respondeat superior” refers to a legal doctrine by which vicarious liability may be imposed on an employer for the torts of an employee without finding fault on the part of the employer. The conditions under which respondeat superior liability may be imposed on an employer vary widely:

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there is a relationship between the employer and the tort victim).
115. Id. at 536, 615 S.E.2d at 605-06.
116. Id. at 540, 615 S.E.2d at 608.
117. Id. at 538, 615 S.E.2d at 607.
118. Id. at 537-38 n.3, 615 S.E.2d at 607 n.3 (quoting Munroe v. Universal Health Servs., 277 Ga. 861, 863, 596 S.E.2d 604, 606 (2004)).
Liability can be imposed under one or more of three theories: (1) that the tortious conduct was within the tortfeasor’s scope of employment; (2) that the tortious conduct was within the tortfeasor’s scope of apparent authority; and/or (3) that the employer authorized or ratified the tortious conduct. Recovery under the first theory is entirely dependent upon the employer-employee (master-servant) relationship. The other theories may be viable where the tortfeasor is an agent but not an employee of the defendant.120

In Travis Pruitt & Associates, P.C. v. Hooper,121 Hooper, a former employee of Travis Pruitt, brought an action against the company. Hooper alleged sexual harassment perpetrated upon her by Taylor, a former co-worker, while at work. She sought damages under the principles of respondeat superior or ratification. After the employer’s motion for summary judgment was denied by the trial court, the Georgia Court of Appeals granted the employer’s application for interlocutory appeal.122 On appeal, the court reversed the trial court’s ruling and held that Hooper could not make out a prima facie case under either respondeat superior or ratification.123

In so holding, the court of appeals pointed out, “Under the principle of respondeat superior, an employer is liable for negligent or intentional torts committed by an employee in furtherance of and within the scope of the employer’s business.”124 The court further noted that Taylor’s alleged harassment was directed at Hooper “for purely personal reasons entirely disconnected from [the company] business.”125 Consequently, Travis Pruitt could not be held liable under respondeat superior for Taylor’s actions because Taylor’s actions were not committed in the scope of the employer’s business.126

Turning to Hooper’s ratification claim, the court began by overruling the holdings of four previous Georgia Court of Appeals cases, Wiley v. Georgia Power Co.,127 Newsome v. Cooper-Wiss, Inc.,128 Trimble v. Circuit City Stores,129 and Mears v. Gulfstream Aerospace Corp.130

120. Id. (citations omitted).
122. Id. at 1, 625 S.E.2d at 447.
123. Id.
124. Id. at 3-5, 625 S.E.2d at 448-49.
125. Id. at 3, 625 S.E.2d at 448.
126. Id.
127. Id.
The court of appeals overruled those cases to the extent they held that an employer could be liable via ratification for sexual harassment committed by an employee not in furtherance of the employer’s business, but for purely personal reasons entirely disconnected from the employer’s business. The court held that for liability via ratification to be imposed on an employer “there must be evidence that the employee’s conduct was done in furtherance of the employer’s business and within the scope of the employment.” In this regard, the court stated that “contrary to the holdings in Wiley, Newsome, Trimble, and Mears, the long-established rule is that, where an employee ‘was acting solely for himself . . . there is no such thing as a master assuming, by ratification, liability for an act of another in which the master had no part.”

The court further stated that not only had a clear rule been defined by the Georgia Court of Appeals and Georgia Supreme Court cases regarding ratification, but that there is a statutory basis for the rule as well. In reversing the trial court’s ruling on Hooper’s ratification claim, the court of appeals provided ample clarification for Georgia practitioners: in Georgia, ratification cannot lie where an employee has committed a tortious act exclusively for himself and not at all for the employer.

C. Restrictive Covenants

1. General Parameters

Agreements that place general restraints on trade with the effect of lessening competition and encouraging monopolies are void as against public policy. Generally, non-competition agreements are disfavored in contractual relations because they place restrictions on trade, thereby thwarting competition. Nonetheless, courts will uphold a non-compete agreement when such an agreement merely places a partial restraint upon trade. A non-competition agreement is valid as a

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133. Id. at 3-4, 625 S.E.2d at 449 (citing Stinespring v. Fields, 129 Ga. App. 715, 715-18, 229 S.E.2d 495, 496-98 (1976)).
134. Id. at 4, 625 S.E.2d at 449 (quoting Reddy-Waldhauer-Maffett Co. v. Spivey, 53 Ga. App. 117, 119-20, 185 S.E. 147, 148 (1936)) (citation omitted).
135. Id.; see also O.C.G.A. § 51-1-12 (2000).
138. Wimbery, supra note 68, at 75.
139. Id.
partial restraint on trade if the agreement is written and specifies (1) time, (2) territorial limitations, and (3) activity restrictions. Additionally, the agreement must be reasonable. Whether it is reasonable is a question of law for the court to decide, and the court will apply varying levels of scrutiny to determine whether the contract is reasonable, depending upon the type of contract. When the agreement is ancillary to an employment agreement, a strict standard applies, meaning the entire agreement is invalid if any provision therein is considered overbroad or unreasonable. But when the agreement is made pursuant to a contract for the sale of a business, a less stringent standard applies, meaning the agreement will survive despite the presence of broad provisions. In applying this less stringent standard, the court may “blue pencil,” i.e., rewrite or sever, provisions deemed overly broad or unreasonable.

2. Legal Duty

In Mau, Inc. v. Human Technologies, Inc., several former employees left MAU, Inc. (“MAU”) and started Human Technologies, Inc. (“HTI”) in a targeted growth area of MAU. The former employees were aware of MAU’s attempts to enter the market in the area where they set up HTI, but MAU had not bound the former employees to enforceable restrictive covenants in the area. MAU sued HTI, alleging, inter alia, that one of the former employees, previously the vice president of MAU, breached his fiduciary duty to the company. The trial court granted HTI summary judgment on the breach of fiduciary duty claim, and MAU appealed the judgment. Conversely, HTI appealed the denial of summary judgment on a tortious interference claim leveled against it by MAU, which had alleged that the former employees had a duty not to interfere with the business contracts and relationships it had established. On appeal, the Georgia Court of Appeals held that absent valid non-competition and non-solicitation covenants, the former employees could not have breached any legal duty owed to MAU because such duties did not exist. In dicta, the court stated that even if a

140. Id.
141. Id.
142. Id.
143. Id.
144. Id. at 75-76.
145. Id.
147. Id. at 891-93, 619 S.E.2d at 395-96.
148. Id. at 896, 619 S.E.2d at 398.
duty had been demonstrated, MAU failed to identify any of its customers who were improperly contacted by HTI.\textsuperscript{149}

Similarly, in \textit{Continental Maritime Services, Inc. v. Maritime Bureau, Inc.},\textsuperscript{150} Continental Maritime Services, Inc. ("Continental") sued Maritime Bureau, Inc. ("MBI") for tortious interference with business relations after the discharge of a Continental employee who was a principal in MBI. The former employee had solicited business for Continental as part of his employment duties. After the former employee was discharged from Continental, he contacted several potential clients he solicited while in the employ of Continental to apprise them that he was no longer with Continental and that he would be able to serve their needs through MBI. At the trial level, the superior court judge granted MBI's motion for a directed verdict, and Continental appealed.\textsuperscript{151}

On appeal, the Georgia Court of Appeals held that MBI was not liable for tortious interference because there was no "employment contract or noncompete agreement" prohibiting the former employee from contacting Continental's customers.\textsuperscript{152} In addition, the court held that the tortious interference claim could not stand because Continental presented no evidence to show that it would have developed business from any of the customers that the former employee contacted.\textsuperscript{153}

3. Reasonableness

\textit{i. Overbreadth.} In \textit{Whimsical Expressions, Inc. v. Brown},\textsuperscript{154} Brown, a former painter for Whimsical Expressions, Inc. ("Whimsical"), continued to paint at the request of past clients from Whimsical.\textsuperscript{155} Whimsical brought a breach of contract action against Brown for violation of non-compete and non-solicitation covenants.\textsuperscript{156} The restrictive covenants stated:

Employee agrees not to work as a painter or sales person in the decorative or faux painting business within Fulton, Gwinnett, Cobb and Forsyth Counties, Georgia for a period of two (2) years following termination of Employee's engagement with the Company. . . .

\begin{itemize}
\item 149. \textit{Id.}
\item 150. 275 Ga. App. 533, 621 S.E.2d 775 (2005).
\item 151. \textit{Id.} at 533-34, 621 S.E.2d at 776-77.
\item 152. \textit{Id.} at 536, 621 S.E.2d at 778-79.
\item 153. \textit{Id.}
\item 155. \textit{Id.} at 423, 620 S.E.2d at 638.
\item 156. \textit{Id.} at 420, 620 S.E.2d at 636.
\end{itemize}
Employee agrees not to solicit or attempt to solicit any decorative or faux painting business from any clients of the Company whose residence or principal place of business is located within Fulton, Gwinnett, Cobb and Forsyth Counties, Georgia with whom Employee had material contact during his or her employment with the Company, for a period of two years (2) following termination of Employee's engagement with the Company. Material contact exists between Employee and a client if the Employee dealt with the client or furnished painting service to the client while working as an employee of the Company within one (1) year prior to the date of Employee's termination of employment with the Company.¹⁶⁷

Beyond handing out the former employer's cards, the former employee never worked as a salesperson for the former employer. At the trial level, the superior court granted the former employee's motion for summary judgment, and the former employer appealed.¹⁵⁸

On appeal, the issue before the Georgia Court of Appeals was whether the non-compete and non-solicitation clauses of the former employee's contract were valid.¹⁵⁹ The former employer maintained that the trial court erred in finding the covenants unenforceable.¹⁶⁰ The Georgia Court of Appeals, however, did not agree and affirmed the lower court's ruling, concluding that "because [the former employer] attempted to preclude [the former employee] not only from performing painting services for prior clients, but also from acting as a salesperson in the... painting business, [the covenant] was overly broad."¹⁶¹ The court further emphasized that the overbreadth of the covenant was its fatal flaw, noting, "Whimsical did not employ 'sales persons' and there was no evidence ... that [the former employee] ever acted as one ..."¹⁶² Turning to the non-solicitation clause, the court stated that the non-solicitation covenant was not breached—despite the former employee continuing to work with prior clients of the former employer—because the prior clients sought out and requested services from the former employee.¹⁶³ The court maintained the differentiation between affirmative solicitation and performance of services for a previous custom-

¹⁵⁷. Id. at 421-22, 620 S.E.2d at 637.
¹⁵⁸. Id. at 420, 423, 620 S.E.2d at 636, 638.
¹⁵⁹. Id. at 421, 620 S.E.2d at 636.
¹⁶⁰. Id. at 422, 620 S.E.2d at 637.
¹⁶¹. Id. at 423, 620 S.E.2d at 637-38 (noting that the covenants' overbreadth requires the affirmation of lower court's ruling because Georgia does not follow the doctrine of severability in the context of employment contracts).
¹⁶². Id., 620 S.E.2d at 638.
¹⁶³. Id.
er.\textsuperscript{164} Thus, a former employee bound by a non-solicitation covenant can continue to work with customers of his previous employer so long as he or she does not affirmatively seek their business. This case indicates Georgia courts' predisposition to disallow any covenant that is not narrowly tailored to the justified protection needs of employers.\textsuperscript{165}

\textit{ii. Time and Territorial Restrictions.} In \textit{Palmer & Cay of Georgia, Inc. v. Lockton Companies},\textsuperscript{166} the Georgia Supreme Court was called upon to determine whether a non-solicitation covenant was unenforceable because of a failure to include a restriction on the period of time during which employees had served customers and its lack of territorial limitation.\textsuperscript{167} Leading up to the suit, several employees left Palmer & Cay of Georgia, Inc. ("P&C") and accepted positions with Lockton Companies, Inc. ("Lockton"). Prior to leaving P&C, the former employees signed a restrictive covenant agreement which fundamentally provided that for a two-year period after leaving their employment, the former employees would not in any way solicit or attempt to solicit or take away the insurance business of any of the customers of their former employer who were served by the former employees during their terms of employment with P&C. There was no time limit on when the former employees may have served P&C's customers. Lockton filed a declaratory judgment action to determine the enforceability of the non-solicitation covenant. In the declaratory judgment action, Lockton asserted that the non-solicitation covenant was unenforceable for failure to include a restriction on the period of time during which the former employees had served customers of P&C. Alternatively, Lockton argued that the non-solicitation covenant was unenforceable for lack of territorial limitation. The trial court found that the covenant was not enforceable.\textsuperscript{168} On appeal, the Georgia Court of Appeals affirmed.\textsuperscript{169}

On appeal, the Georgia Supreme Court held that the non-solicitation covenant was not rendered unenforceable by the failure to include a restriction on the period of time during which employees had served customers.\textsuperscript{170} The court also held that the lack of territorial limitation did not render the covenant unenforceable.\textsuperscript{171} At first glance, the

\begin{footnotesize}
\begin{itemize}
\item 164. \textit{Id.}
\item 166. 280 Ga. 479, 629 S.E.2d 800 (2006).
\item 167. \textit{Id.} at 480, 629 S.E.2d at 802.
\item 168. \textit{Id.}
\item 169. \textit{Id.}
\item 170. \textit{Id.} at 484, 629 S.E.2d at 804.
\item 171. \textit{Id.} at 483, 629 S.E.2d at 803.
\end{itemize}
\end{footnotesize}
supreme court’s holdings seem to be a break from long-held restrictive covenant precedent. However, the court explained that its holding was consistent with longstanding precedent in that the obligations of the non-solicitation covenant were not vitiated by failure to include restrictions on the period of time during which the employees had served P&C's customers. The critical factors were whether the former employees had ever served the customers and whether the customers were still doing business with P&C. The court also emphasized:

[The employer has a protectible interest in the customer relationships its former employee[s] established and/or nurtured while employed by the employer, and is entitled to protect itself from the risk that a former employee might appropriate customers by taking unfair advantage of the contacts developed while working for the employer.]

This interest is “not diminished by the length of time since the [former] employee may have ceased to serve the customer, but depends instead on the fact that the customer relationship was either established or nurtured by the employee.” Explaining its holding as to the territorial restriction, and again quoting W.R. Grace & Co., the court noted in pertinent part:

“Where the parameters of the restrictive covenant are as narrow as those set forth in the certified question, i.e., where the former employee is prohibited from post-employment solicitation of employer customers which the employee contacted during his tenure with the employer, there is no need for a territorial restriction expressed in geographic terms.” Thus, W.R. Grace & Co. is not a departure from any of our prior cases which recognize that, when dealing with a covenant that prohibits the solicitation of customers whom the employee served, the entire length of service of the employee establishes the permissible temporal boundary. Had the intent been to hold that a lesser time limit on the former employee's contact with the customer was required, this Court would have overruled, not reaffirmed, prior cases which

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172. See, e.g., Howard Schultz, 239 Ga. at 183, 236 S.E.2d at 267; Rakestraw v. Lanier, 104 Ga. 188, 201, 30 S.E. 735, 741 (1898).
175. Palmer & Cay, 280 Ga. at 480, 629 S.E.2d at 802 (citation omitted) (quoting W.R. Grace, 262 Ga. at 466, 422 S.E.2d at 532).
176. Id. at 482, 629 S.E.2d at 803 (quoting W.R. Grace, 262 Ga. at 467-68, 422 S.E.2d at 533).
recognize the employer's unqualified interest in protecting its customers who were served by the former employee.\footnote{177}

4. The Arbitration Exception

As noted earlier, Georgia's well-established jurisprudence requires that a restrictive covenant meet a certain bright line test before it may be upheld.\footnote{178} However, in \textit{Malice v. Coloplast Corp.},\footnote{179} the Georgia Court of Appeals rejected a bright line test when reviewing the superior court's decision to confirm an arbitrator's award enforcing restrictive covenants ancillary to an employment contract.\footnote{180} The case arose from a dispute between a former high-level executive and his former employer about the terms of the former employee's separation package. Before resigning from his position with the former employer, the executive signed an employment agreement that contained several restrictive covenants.\footnote{181} Those covenants included non-compete and non-solicitation covenants that were extremely broad territorially (essentially a national prohibition on trade) and forbade competition not only in products similar to those that the former employer sold and distributed, but also any products that it "contemplated selling or distributing" while the former employee was in its employ.\footnote{182} The agreement also included an arbitration clause, which provided that all disputes would be submitted to arbitration under the rules of the American Arbitration Association's Commercial Division. The employment agreement was later amended to include new duties and severance pay even if the former employee chose to leave and was not terminated. In addition, the agreement included advanced severance pay should the former employer exercise its right to invoke the covenant not to compete provision in the employment contract. Soon after the amendment to the contract became effective, the former employee resigned. Upon notice of the employee's resignation, the employer attempted to tender severance to the employee on two occasions, but the checks were immediately returned. Subsequently, the former employee became a partner in a new business that

\begin{footnotes}
\item[177] Id. (citation omitted).
\item[178] See \textit{Howard Schultz}, 239 Ga. at 183, 236 S.E.2d at 267.
\item[180] Id. at 395, 397, 629 S.E.2d at 96, 98 (holding that "[i]t is well established under both federal and Georgia law that 'judicial review of an arbitration award is among the narrowest known to the law'" \textit{Id.} at 397, 629 S.E.2d at 98 (quoting \textit{Gupta v. Cisco Systems,} 274 F.3d 1, 3 (1st Cir. 2001) (citation and punctuation omitted))).
\item[181] Id. at 395-96, 629 S.E.2d at 96-97.
\item[182] Id. at 396, 629 S.E.2d at 97.
\end{footnotes}
competed in the industry of his former employer. The former employer brought suit against the former employee and the dispute was removed to arbitration. The arbitrator found that the restrictive covenants were enforceable and the superior court affirmed. On appeal to the Georgia Court of Appeals, the former employee alleged that the arbitral award operated as a sanction in violation of public policy and the law of restrictive covenants in Georgia.

The Georgia Court of Appeals held that the restrictive covenants were enforceable. The employment agreement specified that any dispute would be governed by the American Arbitration Association’s Commercial Arbitration Rules, which was considered and followed by the arbitrator in his decision. Accordingly, the court of appeals held that the Federal Arbitration Act (“FAA”) was the prevailing law on confirmation of an arbitral award, not Georgia law. Consequently, the court of appeals could only invalidate the confirmation of the arbitrator’s award if it manifestly disregarded applicable state law. The court noted that manifest disregard for the law can only be shown if the arbitrator: (1) appreciated the existence of a clearly governing legal principle and (2) decided to ignore or pay no attention to it. The court of appeals held that the arbitrator did at least consider the clear legal principles (even if he did not enforce those principles). Therefore, manifest disregard for applicable state law could not be established. Consequently, despite precedent striking overly broad restrictive covenants as a matter of course, the court concluded that

183. Id. at 395-97, 629 S.E.2d at 96-97.
184. Id. at 397, 629 S.E.2d at 97-98.
185. Id. at 395, 629 S.E.2d at 96.
186. Id. at 397, 400, 629 S.E.2d at 98.
188. Malice, 278 Ga. App. at 395, 397, 629 S.E.2d at 96, 98 (holding that “the FAA rather than Georgia law controls confirmation of an arbitration award made pursuant to the FAA” (quoting Adage, Inc. v. Bank of America, N.A., 267 Ga. App. 877, 878, 600 S.E.2d 829, 830 (2004))); see also Howard Schultz, 239 Ga. at 183, 236 S.E.2d at 267 (describing a very strict standard of review when construing the validity of a restrictive covenant in an employment contract context under Georgia law).
191. Id. at 400, 629 S.E.2d at 99.
192. Id.
193. See Am. Software USA v. Moore, 264 Ga. 480, 483, 448 S.E.2d 206, 209 (1994) (holding that where territory covered is “anywhere in the United States of America,” a prohibition on contacting customers with whom the employee did not have a relationship
the arbitrator did not commit manifest disregard because he considered Georgia law, even if such consideration yielded a decision in conflict with precedent.¹⁹⁴

IV. CONCLUSION

Although labor and employment issues arising under Georgia law often are not as complex as their federal counterparts, the issues that arise under state law become more challenging with each passing year. Adding to this challenge is the increasing overlap of state and federal issues. Regardless of whether a practitioner professes to specialize in state, federal, administrative, trial, or other matters pertaining to labor and employment law, it is important to recognize that the laws and legal proceedings in one area of law can and do impact relations between employer and employee in others.

¹⁹⁴ Malice, 278 Ga. App. at 399, 629 S.E.2d at 99 (holding "[a]n error in interpreting the applicable law does not constitute 'manifest disregard.' The applicable law must have been deliberately ignored").