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Labor and Employment Law

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I. INTRODUCTION

This Article surveys recent developments in the state statutory and common law that affect labor and employment relations of Georgia employers. Accordingly, it surveys published decisions interpreting

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Georgia law from June 1, 2008 to May 31, 2009.[1] This Article also includes highlights of certain revisions to the Official Code of Georgia Annotated (O.C.G.A.).[2]

II. RECENT LEGISLATION

A. *Modification of Covenants Not to Compete*

On April 29, 2009, Georgia Governor Sonny Perdue signed into law House Bill 173,[3] which amends existing law regarding employment contracts that restrict competition,[4] but this legislation will not become effective unless Georgia passes an amendment to the Georgia Constitution.[5] House Bill 173, if it becomes effective, would allow a court to modify and limit the relief of otherwise unenforceable covenants rather than invalidate them entirely.[6] It would also provide specific guidelines

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1. For analysis of Georgia labor and employment law during the prior survey period, see W. Melvin Haas III, et al. *Labor and Employment Law, Annual Survey of Georgia Law*, 60 MERCER L. REV. 217 (2008).

2. Attorneys practicing labor and employment law have a multitude of reference sources for recent developments in federal legislation and case law. *See generally* THE DEVELOPING LABOR LAW (John E. Higgins Jr. et al. eds., 5th ed. 2006); BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (C. Geoffrey Weirich et al. eds., 4th ed. 2007); W. Christopher Arbery et al., *Labor and Employment, Eleventh Circuit Survey*, 60 MERCER L. REV. 1281 (2009); Daily Lab. Rep. (BNA). Accordingly, this Article is not intended to cover the latest developments in federal labor and employment law. Rather, this Article is intended only to cover legislative and judicial developments arising under Georgia state law during the survey period.

3. Ga. H.R. Bill 173, Reg. Sess., 2009 Ga. Laws 231 (codified at O.C.G.A. §§ 13-8-2, -50 to -59 (1982 & Supp. 2009)).

4. *See id.*, 2009 Ga. Laws at 231 ("AN ACT To amend Chapter 8 of Title 13 of the Official Code of Georgia Annotated, . . . to provide for the enforcement of contracts that restrict or prohibit competition in certain commercial agreements; to provide for the judicial enforcement of such provisions; to provide for the modification of such provisions . . . .").

5. *Id.* § 4, 2009 Ga. Laws at 246 ("This Act shall become effective on the day following the ratification at the time of the 2010 general election of an amendment to the Constitution of Georgia providing for the enforcement of covenants in commercial contracts that limit competition and shall apply to contracts entered into on and after such date and shall not apply in actions determining the enforceability of restrictive covenants entered into before such date. If such amendment is not so ratified, then this Act shall stand automatically repealed.").

6. *Id.* § 3, 2009 Ga. Laws at 243 (codified at O.C.G.A. § 13-8-54 (Supp. 2009)) ("[I]f a court finds that a contractually specified restraint does not comply with [certain provisions], then the court may modify the restraint provision and grant only the relief reasonably necessary to protect [legitimate business interests established by the person seeking enforcement] and to achieve the original intent of the contracting parties to the extent possible.").

for determining such covenants' enforceability.[7] Georgia law already recognizes covenants not to compete in employment contracts, but under current law, if any covenant in a given contract is unreasonable, then all remaining covenants in the same contract are unenforceable.[8]

In 1991 the Georgia Supreme Court invalidated a statute that allowed judicial modification of covenants not to compete[9] on the ground that the statute defeated or lessened competition or encouraged monopolies in violation of the Georgia Constitution.[10] To prevent House Bill 173 from encountering similar constitutional problems, Georgia must hold a referendum in 2010 to amend its constitution to provide for the enforcement of covenants in commercial contracts that limit competition.[11] If Georgia ratifies this constitutional amendment, then House Bill 173 will become effective the following day; otherwise, House Bill 173 will be automatically repealed.[12]

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7. *See id.*, 2009 Ga. Laws at 242–43, 244–46 (codified at O.C.G.A. §§ 13-8-53, -55 to -58 (Supp. 2009)).

8. Ward v. Process Control Corp., 247 Ga. 583, 584, 277 S.E.2d 671, 673 (1981) ("If any covenant not to compete within a given employment contract is unreasonable either in time, territory, or prohibited business activity, then all covenants not to compete within the same employment contract are unenforceable.").

9. O.C.G.A. § 13-8-2.1(g)(1) (Supp. 2009), *invalidated by* Jackson & Coker, Inc. v. Hart, 261 Ga. 371, 371, 405 S.E.2d 253, 254 (1991), *and repealed by* Ga. H.R. Bill 173, § 2, 2009 Ga. Laws at 232–37. The statute provided as follows:

> Every court of competent jurisdiction shall enforce through any appropriate remedy every contract in partial restraint of trade that is not against the policy of the law or otherwise unlawful. In the absence of extreme hardship on the part of the person or entity bound by such restraint, injunctive relief shall be presumed to be an appropriate remedy for the enforcement of the contracts described in subsections (b) through (d) of this Code section. If any portion of such restraint is against the policy of the law in any respect but such restraint, considered as a whole, is not so clearly unreasonable and overreaching in its terms as to be unconscionable, the court shall enforce so much of such restraint as it determines by a preponderance of the evidence to be necessary to protect the interests of the parties that benefit from such restraint. Such a restraint shall be subject to partial enforcement, whether or not it contains a severability or similar clause and regardless of whether the unlawful aspects of such restraint are facially severable from those found lawful.

O.C.G.A. § 13-8-2.1(g)(1).

10. *Jackson & Coker*, 261 Ga. at 371–72, 405 S.E.2d at 254 (citing GA. CONST. art. III, § 6, para. 5(c) ("The General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition, or encouraging a monopoly . . . .")).

11. *See* Ga. H.R. Bill 173, § 4, 2009 Ga. Laws at 246.

12. *Id.*

III. WRONGFUL TERMINATION

A. *Overview*

At-will employment refers to employment that either an employer or an employee may terminate at any time without cause.[13] Though the employment-at-will doctrine is weakening in many jurisdictions,[14] Georgia law presumes that all employment is at-will unless there is a contractual or a statutory exception.[15] In particular, O.C.G.A. § 34-7-1[16] provides that an "indefinite hiring" is at-will employment.[17] Indefinite hiring includes "permanent employment," "employment for life," and "employment until retirement."[18] Reference to an annual salary does not specify a definite period of employment.[19] If an employment contract specifies a definite period of employment, any employment beyond that definite period is employment at-will.[20]

Generally, the discharge of at-will employees is not actionable[21] regardless of the employer's motives or reasons.[22] An employer's oral

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13. BLACK'S LAW DICTIONARY 566 (8th ed. 2004).

14. W. Melvin Haas III, et al., *Labor and Employment Law, Annual Survey of Georgia Law*, 60 MERCER L. REV. 217, 219 (2008) ("[T]he employment-at-will doctrine is gradually eroding in other jurisdictions.") (citing Mark A. Fahleson, *The Public Policy Exception to Employment at Will—When Should Courts Defer to the Legislature?*, 72 NEB. L. REV. 956 (1993); Melanie Robin Galberry, Note, *Employers Beware: South Carolina's Public Policy Exception to the At-Will Employment Doctrine Is Likely to Keep Expanding*, 51 S.C. L. REV. 406 (2000); Kimberly Anne Huffman, Note, Salt v. Applied Analytical, Inc.: *Clarifying the Confusion in North Carolina's Employment-at-Will Doctrine*, 70 N.C. L. REV. 2087 (1992); Cortlan H. Maddux, Comment, *Employers Beware! The Emerging Use of Promissory Estoppel as an Exception to Employment at Will*, 49 BAYLOR L. REV. 197 (1997); Richard J. Pratt, Comment, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-at-Will Doctrine*, 139 U. PA. L. REV. 197 (1990)).

15. *E.g.*, Zimmerman v. Cherokee County, 925 F. Supp. 777, 781 (N.D. Ga. 1995) (citing O.C.G.A. § 34-7-1 (2008)).

16. O.C.G.A. § 34-7-1.

17. *Id.*

18. Ga. Power Co. v. Busbin, 242 Ga. 612, 613, 250 S.E.2d 442, 443–44 (1978) (internal quotation marks omitted).

19. *See* Gatins v. NCR Corp., 180 Ga. App. 595, 597, 349 S.E.2d 818, 820 (1986).

20. Schuck v. Blue Cross & Blue Shield of Ga., Inc., 244 Ga. App. 147, 148–49, 534 S.E.2d 533, 535 (2000).

21. Balmer v. Elan Corp., 278 Ga. 227, 228, 599 S.E.2d 158, 160–61 (2004).

22. *See* Mr. B's Oil Co. v. Register, 181 Ga. App. 166, 167, 351 S.E.2d 533, 534 (1986) ("[When] the plaintiff's employment is terminable at will, the employer, with or without cause and regardless of the motives involved, can discharge the employee without incurring liability. Lengthy allegations regarding the motives or reasons for the firing are legally irrelevant.").

promise not to discharge or treat adversely an at-will employee does not modify the at-will relationship between employer and employee because oral promises are generally not enforceable by at-will employees.[23] When there is no written contract of employment, there is no cause of action against the employer for alleged wrongful termination.[24] When there is an at-will-employment contract, the terms of the employment contract are generally unenforceable.[25]

During the survey period, the United States District Court for the Northern District of Georgia held in *Soloski v. Adams*[26] that under Georgia's at-will-employment doctrine, an employer's oral promise not to find an at-will employee in violation of a sexual harassment policy in exchange for that employee's resignation is unenforceable.[27] In *Soloski* a female University of Georgia employee alleged that the plaintiff, the dean of the University's Grady College of Journalism, sexually harassed her verbally. The plaintiff did not deny making the comments but denied that they constituted sexual harassment.[28] The plaintiff claimed that during an investigation by the University's Office of Legal Affairs (OLA), he and the provost agreed orally that if the plaintiff resigned, the University would not find him in violation of the sexual harassment policy, and the OLA would only write positive things about him. The plaintiff resigned, and two days later the OLA officially found that the plaintiff had violated the sexual harassment policy.[29] Among other things, the plaintiff claimed that the provost and others committed fraud by making a promise not to find him in violation of the sexual harassment policy in exchange for his resignation without the intention of ever following through with that promise.[30] Under Georgia law, "'fraud can be predicated on a misrepresentation [about] a future event where the defendant knows [such] event will not take place, [but] fraud cannot be predicated on a promise which is *unenforceable at the time it is made*.'"[31]

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23. *See Balmer*, 278 Ga. at 228–29, 599 S.E.2d at 161.

24. *Id.*; *see* Jacobs v. Georgia-Pacific Corp., 172 Ga. App. 319, 320, 323 S.E.2d 238, 239 (1984).

25. *See* Rodriguez v. Vision Corr. Group, Inc., 260 Ga. App. 478, 479, 580 S.E.2d 266, 268 (2003).

26. 600 F. Supp. 2d 1276 (N.D. Ga. 2009).

27. *Id.* at 1320.

28. *Id.* at 1290–91.

29. *Id.* at 1294–95.

30. *Id.* at 1317.

31. *Id.* at 1320 (quoting Studdard v. George D. Warthen Bank, 207 Ga. App. 80, 81, 427 S.E.2d 58, 59 (1993)).

Among the issues before the court was whether the provost's promise, if actually made,[32] would have been enforceable at the time it was made.[33] The court held that "oral promises by employers are not enforceable by at-will employees."[34] Because the plaintiff's employment contract specifically provided that he held his "administrative title and position at the pleasure of the President," his employment was at-will under Georgia law.[35] Because the provost could have "terminate[d the] plaintiff's employment as dean for any reason at any time, any terms of the agreement reached between [the] plaintiff and [the] defendants not reduced to writing were unenforceable at the time they were made."[36] Therefore, the charge of fraud could not be supported by the alleged oral promise.[37]

B. Exceptions to At-Will Employment

The statute creating the employment-at-will doctrine contains a significant exception: the parties may contract otherwise.[38] During the survey period, the Georgia Court of Appeals in *Avion Systems, Inc. v. Thompson*[39] held that an employee's covenant to work for at least twelve months was enforceable, even though the employment was generally at-will.[40] In *Avion* the employer claimed that its former employee violated a provision in the employment contract by terminating her employment before the required term of one year. The introductory paragraph of the contract provided that the employee was a "full time employee at will," but the body of the contract provided that the employee agreed to provide services "for a minimum of twelve (12) months."[41] Among the issues before the court was whether the agreement to provide services for twelve months was invalid because it conflicted with the general provision for employment at-will.[42] The

32. *Id.* at 1317 (noting that the provost denied ever making such a promise).
33. *See id.* at 1319.
34. *Id.* at 1320.
35. *Id.* at 1319–20.
36. *Id.* at 1320.
37. *Id.*
38. *See* O.C.G.A. § 34-7-1.
39. 293 Ga. App. 60, 666 S.E.2d 464 (2008). This is a later procedural instance of *Avion Systems, Inc. v. Thompson*, 286 Ga. App. 847, 650 S.E.2d 349 (2007), *rev'd*, 284 Ga. 15, 663 S.E.2d 236 (2008), *discussed in* W. Melvin Haas III, et al., *Labor and Employment Law, Annual Survey of Georgia Law*, 60 MERCER L. REV. 217, 221–22 (2008).
40. 293 Ga. App. at 60–61, 666 S.E.2d at 465–66.
41. *Id.* at 61, 666 S.E.2d at 466 (internal quotation marks omitted).
42. *Id.* at 62, 666 S.E.2d at 467.

court of appeals held the agreement was valid.[43] Relying on the general rule of contract construction that "'when a [contractual] provision specifically addresses the issue in question, it prevails over any conflicting general language,'" the court reasoned that the specific provision for a minimum of twelve months' service prevailed over the conflicting general at-will language.[44] The court reasoned that this result effectuated the intent of the parties, upheld the whole contract and each of its parts, and was consistent with common practice.[45]

C. Continued Employment as Consideration Supporting Other Agreements

During the survey period, the United States District Court for the Northern District of Georgia held in *Dixie Homecrafters, Inc. v. Homecrafters of America, LLC*[46] that under Georgia law, a forum selection clause in a nondisclosure agreement is enforceable against at-will employees, even though the only consideration is continued employment.[47] In *Dixie Homecrafters*, the plaintiff business organizations, citizens of Georgia, sued several business and individual defendants, alleging various torts and unlawful competition.[48] Six of the individual defendants were former employees in plaintiff's Pennsylvania office,[49] and all six testified individually that they were not residents of Georgia.[50] Three of these defendants had signed a nondisclosure agreement with the plaintiff.[51] Paragraph 6.1 of that agreement provided that

> This Agreement and any disputes arising under or related thereto (whether for breach of contract, tortious conduct, or otherwise) shall be governed by the laws of the State of Georgia, without reference to its conflict of law principles. Any legal actions, suits or proceedings arising out of this Agreement (whether for breach of contract, tortious conduct, or otherwise) shall be brought exclusively in the state or federal courts

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43. *Id.* at 62–63, 666 S.E.2d at 467.

44. *Id.* at 63, 666 S.E.2d at 467 (quoting Woody's Steaks, LLC v. Pastoria, 261 Ga. App. 815, 818, 584 S.E.2d 41, 44 (2003)). In *Avion Systems*, "although the employment was generally at-will, it was subject to [the employee's] agreement to refrain from terminating her employment for [twelve] months." *Id.*

45. *Id.*

46. No. 1:08-CV-0649-JOF, 2009 WL 596009 (N.D. Ga. Mar. 5, 2009).

47. *Id.* at *6.

48. *Id.* at *1.

49. *Id.*

50. *See id.* at *1–3 (discussing the residence of each employee defendant and their contacts with Georgia).

51. *Id.* at *4.

> of Georgia, and the parties to this Agreement hereby accept and submit to the personal jurisdiction of these Georgia courts with respect to any legal actions, suits or proceedings arising out of this Agreement.[52]

The defendants claimed that Georgia lacked personal jurisdiction over them and argued that the nondisclosure agreement was invalid because there was no additional consideration, which Pennsylvania law would require.[53] The district court applied Georgia's choice of law rule and held that, unlike Pennsylvania law, Georgia law "permits the signing of a non-disclosure or non-compete agreement for at-will employees with no additional consideration other than continued employment."[54] Accordingly, it found the nondisclosure agreement valid and concluded that the defendants who signed the agreement had contractually consented to Georgia's exercise of personal jurisdiction over them.[55]

IV. NEGLIGENT HIRING OR RETENTION

A. Overview

Under O.C.G.A. § 34-7-20,[56] "[t]he employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency."[57] The Georgia Court of Appeals has held that this statute imposes a duty on the employer to "warn other employees of dangers incident to employment that 'the employer knows or ought to know but which are unknown to the employee.'"[58] For an employee to sustain an action for negligent hiring or retention, a plaintiff must show that the employer employed an individual who "the employer knew or should have known posed a risk of harm to others where it [was] reasonably foreseeable from the employee's tendencies or propensities that the employee could cause the type of harm sustained

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52. *Id.*

53. *Id.*

54. *Id.* at *6. The court explained, "'[i]n a case founded on diversity jurisdiction, the district court must apply the forum state's choice of law rules.'" *Id.* (quoting Federated Rural Elec. Ins. Exch. v. R.D. Moody & Assocs., Inc., 468 F.3d 1322, 1325 (11th Cir. 2006)).

55. *Id.*

56. O.C.G.A. § 34-7-20 (2008).

57. *Id.*

58. Tecumseh Prods. Co. v. Rigdon, 250 Ga. App. 739, 740, 552 S.E.2d 910, 912 (2001) (quoting O.C.G.A. § 34-7-20).

by the plaintiff."[59] Typically, "the determination of whether an employer used ordinary care in hiring an employee is a jury issue."[60]

B. Evidence of Prior Similar Misconduct

During the survey period, the Georgia Court of Appeals held in *Ferman v. Bailey*[61] that evidence of an employee's previous harassment of other employees is relevant to a claim of negligent hiring and retention because it tends to show that the employer should have known that the employee posed a risk of committing similar harassment against the plaintiff.[62] In *Ferman* a female dental hygienist sued a male dentist for numerous tort charges and sued the dental center where they both worked for negligent hiring and retention of that dentist. The dentist possessed a photograph of the hygienist in her bathing suit taken in Mexico on an employer-sponsored trip. He posted the picture in her workspace with the words "Ready in Mexico" written on it and told her that he would have the photograph enlarged. He habitually called her "R.I.M," which stood for "Ready in Mexico," in front of patients and other employees.[63]

The dentist followed the hygienist around the workplace so frequently that she asked other employees to accompany her to the supply room and the restroom, but the dentist habitually sent those employees to the front of the office. He told her that he wanted to play strip poker with her, then gave her a deck of cards and told her to start practicing. The following month, the dentist carried a bottle of vodka to the hygienist's home so that, according to him, they could play strip poker and probably have sex. At her home he grabbed her and pushed her body against his. After she asked him to leave, the dentist threatened to kill her and kissed her on the mouth.[64] The jury returned a verdict in favor of the hygienist on the negligent hiring and retention claims.[65]

At trial, the hygienist presented evidence that the dental center knew the dentist had harassed other employees.[66] The dentist and the dental center argued on appeal that the trial court should not have admitted

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59. Munroe v. Universal Health Servs., Inc., 277 Ga. 861, 863, 596 S.E.2d 604, 606 (2004) (internal quotation marks omitted).

60. *Tecumseh Prods. Co.*, 250 Ga. App. at 741, 552 S.E.2d at 912 (citing Sparlin Chiropractic Clinic, P.C. v. TOPS Pers. Servs., Inc., 193 Ga. App. 181, 181–82, 387 S.E.2d 411, 412 (1989)).

61. 292 Ga. App. 288, 664 S.E.2d 285 (2008).

62. *Id.* at 290, 664 S.E.2d at 287.

63. *Id.* at 288–89, 664 S.E.2d at 286–87.

64. *Id.* at 289, 664 S.E.2d at 287.

65. *Id.* at 288, 664 S.E.2d at 286.

66. *See id.* at 291, 664 S.E.2d at 288.

such evidence because the witnesses did not testify to tortious conduct against the plaintiff.[67] The court of appeals held that such evidence was admissible for the claim of negligent hiring and retention "because it tended to show that the Dental Center should have known that [the dentist] posed a risk of committing the same type of harassing behavior against [the hygienist]."[68]

C. *Unrelated Criminal History*

During the survey period, the United States Court of Appeals for the Eleventh Circuit held in *CSX Transportation, Inc. v. Pyramid Stone Industries, Inc.*[69] that, under Georgia law, liability for negligent hiring will not attach simply because an employee has a criminal history unrelated to the misconduct at issue in the current litigation[70] unless that criminal history made the misconduct foreseeable.[71] In *CSX* the defendant's employee drove a front-end loader over railroad tracks, causing the tracks such damage that the plaintiff's train derailed. The defendant knew its employee had a criminal record.[72] The railroad argued that the employee's criminal record demonstrated "dangerous propensities to disobey rules, take things that do not belong to him, and trespass onto other people's property and damage their property" and, therefore, "a reasonable jury could find that [the defendant] breached its duty of ordinary care in hiring, retaining, training and supervising [the employee]."[73]

The Eleventh Circuit disagreed and noted that under the plaintiff's reasoning, "it would be negligent for any employer whose work includes dangerous machinery to hire an employee who has a history of violence or irresponsibility."[74] Moreover, the court pointed out that the employee was well qualified for the job because of his prior experience with dangerous heavy machinery, and "none of his past criminal conduct occurred during his prior work with such equipment."[75]

The court also noted that, under Georgia law, the causation element in the torts of negligent hiring and retention require that it be "reason-

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67. *Id.* at 290, 664 S.E.2d at 287.
68. *Id.*
69. 293 F. App'x 754 (11th Cir. 2008).
70. *Id.* at 756.
71. *See id.*
72. *Id.* at 755. The court did not discuss the specific nature of the employee's criminal history other than that it involved the employee's "irresponsibility for others' property." *Id.* at 756.
73. *Id.* at 755 (internal quotation marks omitted).
74. *Id.* at 756.
75. *Id.*

ably foreseeable from the employee's tendencies or propensities that the employee could cause the type of harm sustained by the plaintiff."[76] To satisfy this test, the "'victim's injuries should have been foreseen as the natural and probable consequence of hiring [or retaining] the employee.'"[77] The court held that the employee's criminal history would not make it natural and probable that he would trespass on the plaintiff's property using the defendant's equipment.[78]

V. RESTRICTIVE COVENANTS

A. *Noncompete Agreements*

1. Overview. Agreements that place general restraints on trade are void as against public policy.[79] Generally, noncompete agreements are disfavored in contractual relations because they place restrictions on trade, thereby reducing competition.[80] Nonetheless, courts will uphold a noncompete agreement when the agreement merely places a partial restraint upon trade.[81] In general, a noncompete agreement is valid as a partial restraint on trade when the agreement is specific and is reasonable in regard to duration, territorial coverage, and the scope of activities prohibited.[82]

Whether the terms of the noncompete agreement are reasonable is a question of law for the court to decide.[83] A questionable restriction, if not void on its face, may require the introduction of additional facts to determine whether it is reasonable.[84] However, depending on the type of contract, the court will apply different levels of scrutiny to determine the reasonableness of the contract.[85] If the noncompete agreement is ancillary to an employment agreement, a stricter standard is applied;[86] and if any provision of that agreement is considered overbroad or

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76. *Id.* (internal quotation marks omitted) (quoting *Munroe*, 277 Ga. at 863, 596 S.E.2d at 606).

77. *Id.* (alteration in original) (quoting TGM Ashley Lakes, Inc. v. Jennings, 264 Ga. App. 456, 459, 590 S.E.2d 807, 813 (2003)).

78. *Id.*

79. O.C.G.A. § 13-8-2(a)(2) (1982 & Supp. 2009).

80. *See* JAMES W. WIMBERLY JR., GEORGIA EMPLOYMENT LAW § 2:11 (4th ed. 2008).

81. *See id.*

82. *See* W.R. Grace & Co., Dearborn Div. v. Mouyal, 262 Ga. 464, 465, 422 S.E.2d 529, 531 (1992). *See generally* WIMBERLY, *supra* note 80, § 2:11.

83. *Mouyal*, 262 Ga. at 465, 422 S.E.2d at 531.

84. Koger Props., Inc. v. Adams-Cates Co., 247 Ga. 68, 69, 274 S.E.2d 329, 331 (1981).

85. *See* WIMBERLY, *supra* note 80, § 2:11.

86. *See id.*

unreasonable, the entire agreement is invalid.[87] But if the agreement is pursuant to a contract for the sale of a business, a less stringent standard allows for broader provisions; even if provisions of that agreement are deemed overbroad or unreasonable, the court may "blue pencil" to rewrite or sever the overly broad provisions.[88] However, "in restrictive covenant cases strictly scrutinized as employment contracts, Georgia does not employ the 'blue pencil' doctrine of severability."[89]

2. Franchise Agreements. Shortly after this year's survey period ended, the Georgia Supreme Court affirmed the Georgia Court of Appeals decision in *Atlanta Bread Co. International v. Lupton-Smith*.[90] The court held that a covenant not to compete in a franchise agreement, to be enforceable, must contain definite territorial limitations and specify the restricted activities with sufficient particularity.[91] In *Atlanta Bread*, the plaintiff owned several franchises of the Atlanta Bread Company and his franchise agreement contained the following restrictive covenant:

> During the term of this Agreement, neither Franchisee nor any Principal Shareholder, for so long as such Principal Shareholder owns an Interest in Franchisee, may, without prior written consent of Franchisor, directly or indirectly engage in, or acquire any financial or beneficial interest in (including any interest in corporations, partnerships, trusts, unincorporated associations or joint ventures), advise, help, guarantee loans or make loans to, any bakery/deli business whose method of operation is similar to that employed by store units within the System.[92]

While the plaintiff owned these franchises, Atlanta Bread learned that the plaintiff had entered a franchise agreement with PJ's Coffee, a competing business, and Atlanta Bread terminated the plaintiff's franchise agreement on the ground that his new PJ's Coffee franchise constituted a material breach of the above-quoted covenant.[93]

The court held that the restrictive covenant was unenforceable because it lacked a territorial limitation.[94] The court noted that in a franchise

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87. *See id. But see supra* notes 3–12 and accompanying text.

88. *See* WIMBERLY, *supra* note 80, § 2:11 n.35.

89. Advance Tech. Consultants, Inc. v. Roadtrac, LLC, 250 Ga. App. 317, 320, 551 S.E.2d 735, 737 (2001). *But see supra* notes 3–12 and accompanying text.

90. 285 Ga. 587, 679 S.E.2d 722 (2009).

91. *Id.* at 591, 679 S.E.2d at 725.

92. *Id.* at 588, 679 S.E.2d at 723 (internal quotation marks omitted).

93. *Id.*, 679 S.E.2d at 724.

94. *Id.* at 591, 679 S.E.2d at 725.

agreement, if any part of a restrictive covenant is unreasonable, the entire agreement is unenforceable.[95] In response to Atlanta Bread's contention that the usual rules regarding employment-context restrictive covenants should not apply to franchise agreements, the court held that a covenant not to compete in a franchise agreement should "receiv[e] the same treatment as noncompetition covenants found in employment contracts."[96] The same measure of reasonableness applies to both contracts.[97]

3. Scope of Prohibited Activities. During the survey period, the Georgia Court of Appeals held in *Azzouz v. Prime Pediatrics, P.C.*[98] that a provision in a covenant, which prohibited a pediatrician from using a broad variety of advertising venues within a five-county region for two years, was not unreasonably broad.[99] In *Azzouz* a pediatrician's employment contract contained a covenant prohibiting him from practicing pediatric medicine in a five-county area for two years if his employment should terminate. After this pediatrician informed his employer of his intent to leave and start his own practice in the prohibited area, the employer obtained an interlocutory injunction, from which the pediatrician appealed.[100] The appellant's primary claim on appeal was that the language in the restrictive covenant was ambiguous and thus overbroad.[101] The restrictive covenant provided, among other things, that

> [n]othing contained herein however shall be construed so as to prohibit the Employee from practicing medicine as a pediatrician outside the territory set forth above before the expiration of said two (2) years, or within the territory as described above after the expiration of two (2) years, nor from prohibiting the Employee from practicing specifically any specialty of medicine other than pediatrics.[102]

The agreement prohibited

> advertising in any form, including but not limited to, telephone, white and yellow pages, radio, newspaper advertisements, signage advertising, keeping or maintaining an office within the prohibited geographical area, posting web-sites showing business locations in the prohibited

95. *Id.*
96. *Id.* at 589, 679 S.E.2d at 724.
97. *Id.*
98. 296 Ga. App. 602, 675 S.E.2d 314 (2009).
99. *Id.* at 607, 675 S.E.2d at 319.
100. *Id.* at 602, 675 S.E.2d at 316.
101. *Id.* at 603, 675 S.E.2d at 317.
102. *Id.* (internal quotation marks omitted).

> geographical area, or mailings to patients of Employer within the prohibited geographical area.[103]

The appellant argued that the covenant could "be read to mean either (1) the defendant is only barred from working as a pediatrician and advertising his services within the five-county area, or (2) the defendant is *also* barred from working in any hospital that advertises within the five-county area."[104] The court disagreed and held that in light of the clause reading "[n]othing contained herein however shall be construed so as to prohibit the Employee from practicing medicine as a pediatrician outside the territory," the agreement was unambiguous.[105]

The court then considered whether this unambiguous agreement was reasonable.[106] It held that

> [w]ith regard to the restriction on mailings to all of [the employer's] patients, there is an interplay between the scope of the prohibited behavior and the territorial restriction: "if the scope of prohibited behavior is narrow enough (e.g., contacting those with whom the employee dealt while working for the employer), the covenant may be reasonable even if it has no territorial limitation or has a territorial limitation which is very broad. But if the scope of the prohibition is broader, the territorial limitation must be specified and closely tied to the area in which the employee actually worked."[107]

The trial court concluded that the appellant intended to continue practicing in all five of the prohibited counties and had practiced in all five on behalf of his employer.[108] Accordingly, the court of appeals held that the restrictive covenant was reasonable.[109] Also relevant in the court's analysis was a factually similar case, *Raiford v. Kramer*,[110] in which the Georgia Supreme Court upheld a covenant that (1) had a duration of two years, (2) "applied to [a] five-county [region] where the employer's practice was located and from which it drew patients," and (3) was limited to a particular medical specialty.[111]

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103. *Id.* at 604, 675 S.E.2d at 317 (internal quotation marks omitted).

104. *Id.*

105. *Id.* at 604–05, 675 S.E.2d at 318 (alteration in original) (internal quotation marks omitted).

106. *Id.* at 606, 675 S.E.2d at 319–20.

107. *Id.*, 675 S.E.2d at 319 (quoting Chaichimansour v. Pets are People Too, No. 2, Inc., 226 Ga. App. 69, 71, 485 S.E.2d 248, 250 (1997)).

108. *Id.* at 607, 675 S.E.2d at 319.

109. *Id.*

110. 231 Ga. 757, 204 S.E.2d 171 (1974).

111. *Azzouz*, 296 Ga. App. at 607, 675 S.E.2d at 319 (citing *Raiford*, 231 Ga. at 758, 204 S.E.2d at 172).

4. Specification with Particularity. During the survey period, the Georgia Court of Appeals held in *Avion Systems, Inc. v. Thompson*,[112] discussed above,[113] that a covenant prohibiting an employee "from dealing with a client for any pecuniary gain, regardless of whether her activities were related to [the employer's] business [was] overbroad and unenforceable, as it [was] not reasonably necessary to protect the interests of [the employer]."[114] To determine the reasonableness of the covenant, the court endorsed a "three-element test of duration, territorial coverage, and scope of activity."[115] Regarding the third element of this test, the court noted that a covenant that "does not specify with particularity the nature of the business activities in which the employee is forbidden to engage is generally considered unreasonable."[116] The court held that the provision against dealing with a client for "any pecuniary gain" did not specify the prohibited activities and was thus unreasonable.[117]

Also during the survey period, the Georgia Court of Appeals held in *Global Link Logistics, Inc. v. Briles*[118] that "[a]lthough facts may be necessary 'to show that a questionable restriction, though not void on its face, is, in fact, reasonable,' a covenant containing sufficiently indefinite restrictions '[can]not be saved by additional facts' and is 'void on its face.'"[119] In *Global Link Logistics*, the plaintiff, who left an executive position at the defendant firm and began work for a competitor, sought injunctive and declaratory relief regarding the restrictive covenants in his employment agreement.[120] The noncompete covenant barred the plaintiff from "engag[ing] (whether as an owner, operator, manager, employee, officer, director, consultant, advisor, representative *or otherwise*), *directly or indirectly,* in any Competitive Business" and also barred solicitation of all customers and employees.[121] The agreement also contained an arbitration clause, providing that "arbitration . . . shall be the sole and exclusive method for resolving any claim or dispute . . .

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112. 293 Ga. App. 60, 666 S.E.2d 464 (2008).

113. *See supra* notes 39–45 and accompanying text.

114. 293 Ga. App. at 64, 666 S.E.2d at 468 (internal quotation marks omitted).

115. *Id.*

116. *Id.*

117. *Id.*

118. 296 Ga. App. 175, 674 S.E.2d 52 (2009).

119. *Id.* at 177, 674 S.E.2d at 54 (second alteration in original) (quoting *Koger Props., Inc.*, 247 Ga. at 69, 274 S.E.2d at 331).

120. *Id.* at 175, 674 S.E.2d at 53.

121. *Id.* at 178, 674 S.E.2d at 55 (alteration in original) (internal quotation marks omitted).

arising out of or relating to the rights and obligations of the parties under this Agreement."[122]

The trial court held the covenants unenforceable and denied the defendant's motion to compel arbitration regarding the covenants. The defendant appealed, contending that the trial court abused its discretion in finding the covenants unenforceable and in refusing to submit the entire matter to arbitration.[123] The court of appeals noted that "'[w]hether [a] restraint imposed by [an] employment contract is reasonable is a question of law for determination by the court, which considers the nature and extent of the trade or business, the situation of the parties, and all the other circumstances.'"[124] The court of appeals thus reviewed the trial court's denial of the motion to compel arbitration in terms of its correctness as a matter of law.[125] Under Georgia law, "'[a] non-competition covenant which prohibits an employee from working for a competitor in any capacity, that is, a covenant which fails to specify with particularity the activities which the employee is prohibited from performing, is too broad and indefinite to be enforceable.'"[126] Thus, the court held the covenant unenforceable.[127] Because the plaintiff did not hold any interest in the defendant company, the lesser scrutiny afforded to covenants ancillary to the sale of a business did not apply in this case; therefore, the covenants could not be judicially modified to make them acceptable.[128]

B. Nondisclosure Agreements

The court of appeals also held in *Global Link Logistics* that a nondisclosure clause was overbroad and unenforceable[129] because the clause had no time limitation and prohibited the defendant from disclosing or using for his own purposes "the information (including lists of customers or potential customers), observations, customer and vendor relationships and data (including trade secrets) obtained by him while employed by the Company."[130]

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122. *Id.* at 176, 674 S.E.2d at 54 (alterations in original).

123. *Id.* at 175, 675 S.E.2d at 53.

124. *Id.* (alterations in original) (quoting Habif, Arogeti & Wynne, P.C. v. Baggett, 231 Ga. App. 289, 292, 498 S.E.2d 346, 350 (1998)).

125. *Id.*

126. *Id.* at 178, 675 S.E.2d at 55 (quoting Nat'l Teen-Ager Co. v. Scarborough, 254 Ga. 467, 469, 330 S.E.2d 711, 713 (1985)).

127. *Id.*

128. *Id.* at 177, 675 S.E.2d at 55.

129. *Id.* at 177–78, 674 S.E.2d at 55.

130. *Id.* at 175, 674 S.E.2d at 53–54 (internal quotation marks omitted).

Also during the survey period, the Georgia Court of Appeals held in *Atlanta Bread Co. International, Inc. v. Lupton-Smith*[131] that a nondisclosure restriction in a franchise agreement—which forbade the franchisee from appropriating or disclosing the franchisor's trade secrets—was reasonable insofar as it pertained to information meeting the statutory definition of a trade secret.[132] The nondisclosure clause provided:

> Neither Franchisee nor any Shareholder shall at any time (i) appropriate or use the trade secrets incorporated in the System, or any portion thereof, in any business which is not within the System, (ii) disclose or reveal any portion of the System to any person, other than to Franchisee's Store employees as an incident of their training, . . . (iv) communicate, divulge or use for the benefit of any other person or entity any confidential information, knowledge or know-how concerning the methods of development or operation of a store utilizing the System, which may be communicated by Franchisor in connection with the franchise granted hereunder.[133]

The court noted that under Georgia law, a "nondisclosure clause with no time limitation, as here, is unenforceable as to information that is not a trade secret."[134] Therefore, it held that this nondisclosure clause was only enforceable with regard to trade secrets as defined by O.C.G.A. § 10-1-761(4).[135] The court also held that the issue of whether a party

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131. 292 Ga. App. 14, 663 S.E.2d 743 (2008), *aff'd*, 285 Ga. 587, 679 S.E.2d 722 (2009). The supreme court did not address the nondisclosure restriction. For a discussion of the supreme court opinion, *see supra* text accompanying notes 90–97.

132. 292 Ga. App. at 20, 663 S.E.2d at 748.

133. *Id.* at 16, 663 S.E.2d at 745–46 (ellipses in original) (internal quotation marks omitted).

134. *Id.* at 20, 663 S.E.2d at 748.

135. O.C.G.A. § 10-1-761(4) (2009); *Atlanta Bread Co.*, 292 Ga. App. at 20, 663 S.E.2d at 748. The statute provides as follows:

> "Trade secret" means information, without regard to form, including, but not limited to, technical or nontechnical data, a formula, a pattern, a compilation, a program, a device, a method, a technique, a drawing, a process, financial data, financial plans, product plans, or a list of actual or potential customers or suppliers which is not commonly known by or available to the public and which information:
>
> (A) Derives economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

O.C.G.A. § 10-1-761(4).

has disclosed a trade secret is a question of fact for the jury to determine.[136]

C. *Nonsolicitation Agreements*

The court of appeals held in *Global Link Logistics*, discussed above,[137] that a nonsolicitation agreement barring an employee from soliciting any of the employer's customers, present or future suppliers, or employees for twenty-four months[138] was unenforceable.[139] However, because this nonsolicitation was discussed only in conjunction with the same contract's unenforceable noncompete agreement,[140] and because under Georgia law the unenforceability of one part of a restrictive covenant will render the entire covenant unenforceable,[141] it does not appear that the nonsolicitation agreement at issue was essential to the judgment.

VI. CONCLUSION

Although labor and employment issues derived from Georgia law often are not as complex as their federal counterparts, the issues arising under state law are becoming more challenging with each passing year. Adding to this challenge is the growing overlap between state and federal issues. Regardless of whether a practitioner professes to specialize in state, federal, administrative, or trial law, it is important to recognize that any one law or legal proceeding can and does impact other relations between employer and employee.

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136. *Atlanta Bread Co.*, 292 Ga. App. at 21, 663 S.E.2d at 749.

137. *See supra* text accompanying notes 118–30.

138. 296 Ga. App. at 175–76, 674 S.E.2d at 54.

139. *Id.* at 178, 674 S.E.2d at 55.

140. *See id.* ("The noncompete covenant at issue here bars [the employee] from 'engag[ing] (whether as an owner, operator, manager, employee, officer, director, consultant, advisor, representative *or otherwise*), *directly or indirectly*, in any Competitive Business,' and also bars solicitation of all [the employer's] customers as well as employees. As such, it is unenforceable." (second alteration in original)).

141. *See, e.g.*, Trujillo v. Great S. Equip. Sales, LLC, 289 Ga. App. 474, 478, 657 S.E.2d 581, 584 (2008) ("Because the nonsolicitation clause was unenforceable, the noncompetition clause included in the agreement was likewise unenforceable.").