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## Labor and Employment

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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, 2004 to May 31, 2005. This Article also highlights specific revisions to the Official Code of Georgia Annotated ("O.C.G.A.").

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## II. RECENT LEGISLATION

Without regard to the General Assembly's changes to the "Workers' Compensation" section<sup>1</sup> of the Georgia Labor and Industrial Relations Code ("Labor Code"),<sup>2</sup> the General Assembly passed three noteworthy amendments to Georgia's Labor Code during the survey period.

The General Assembly addressed the "Living Wage"<sup>3</sup> when it amended O.C.G.A. section 34-4-3.1<sup>4</sup> by adding a subsection prohibiting local government attempts to establish local wage or employment benefits through purchasing or contracting procedures. This subsection was passed in an attempt to further eliminate wage and benefit disparities that the General Assembly perceived to be "creating an anticompetitive marketplace [and] foster[ing] job and business relocation."<sup>5</sup> While the amendment is a further pronouncement on the General Assembly's goal of eliminating local minimum wages, the amended language varies little from the preexisting language of O.C.G.A. section 34-4-3.1(b)(2).<sup>6</sup> Apparently, after last year's passage of O.C.G.A. section 34-4-3.1, which preempted all local government from setting a wage or employment benefit mandate, local governments continued to establish such local minimums through the use of evaluation factors and qualifications of bidders for contractors and

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1. Recent developments in workers' compensation law are discussed in H. Michael Bagley, Daniel C. Kniffen & Katherine D. Dixon, *Workers' Compensation*, 57 MERCER L. REV. 419 (2005).

2. O.C.G.A. §§ 34-1-1 to -421 (1998 & Supp. 2005).

3. The Fair Labor Standard Act, the federal minimum wage statute, allows state and local governments to enact minimum wages higher than the federal standard, though, until recently, few states and municipalities have taken this opportunity. 29 U.S.C. § 218(a) (2000). Based upon the premise that the federal minimum wage has failed to keep pace with inflation, the Association of Community Organizations for Reform Now (ACORN) began a "Living Wage" Campaign in the mid-1990s in an effort to pressure municipalities into raising minimum wages at the local level around the country. See ACORN *Living Wage Res. Ctr.* website, available at <http://www.livingwagecampaign.org> (last visited Aug. 2, 2004). Indeed, ACORN's website declares that it had "Living Wage Campaigns Underway" in both Atlanta and Athens, Georgia, as well as on the campuses of Agnes Scott College and Valdosta State University. *Id.* So far, ACORN counts among its victories 130 cities and counties that allegedly have passed living wage ordinances. *Id.*

4. Ga. H.R. Bill 59, Reg. Sess. (2005) (amending O.C.G.A. § 34-4-3.1 (2004)).

5. W. Melvin Haas, III, et al., *Labor and Employment Law*, 56 MERCER L. REV. 291, 292 (2004) (internal quotations omitted).

6. O.C.G.A. § 34-4-3.1(b) (2004 & Supp. 2005). In relevant part, O.C.G.A. section 34-4-3.1(b) provides: "(b)(1) No local government entity may adopt, maintain, or enforce by charter, ordinance, purchase agreement, contract, regulation, rule, or resolution, either directly or indirectly, a wage or employment benefit mandate." O.C.G.A. § 34-4-3.1(b)(2).

vendors.<sup>7</sup> The practical effect may take years to see as local governments battle with their desire to provide a living wage and to comply with state law.

The General Assembly also made several amendments to Georgia's Employment Security Act,<sup>8</sup> which dictates the circumstances under which the Georgia Department of Labor is required to pay unemployment benefits. The General Assembly amended O.C.G.A. section 34-8-194<sup>9</sup> to allow the payment of benefits to an employee who loses his or her job to accompany a spouse who is reassigned from one military post to another.<sup>10</sup> The General Assembly also increased the unemployment insurance benefit amount.<sup>11</sup> The rate change will take effect over a two-year period.<sup>12</sup> In addition, the bill extends the ceiling on employer surcharge payments through December 31, 2006, providing a reduced adjustment in contribution rates through December 31, 2006.<sup>13</sup>

Finally, in order to comply with the Federal SUTA-Dumping Prevention Act of 2004,<sup>14</sup> the General Assembly amended O.C.G.A. section 34-8-153.<sup>15</sup> SUTA-dumping occurs (1) when commonly controlled employers transfer business amongst themselves in order to apply the low or

7. Haas, *supra* note 5. O.C.G.A. section 34-4-3.1(c), as amended, provides:

(c) No local government entity may through its purchasing or contracting procedures seek to control or affect the wages or employment benefits provided by its vendors, contractors, service providers, or other parties doing business with the local government entity. A local government entity shall not through the use of evaluation factors, qualification of bidders, or otherwise award preferences on the basis of wages or employment benefits provided by its vendors, contractors, service providers, or other parties doing business with the local government entity.

O.C.G.A. § 34-4-3.1(c) (2004 & Supp. 2005).

8. O.C.G.A. §§ 34-8-1 to -256 (2004 & Supp. 2005).

9. Ga. H.R. Bill 404, Reg. Sess. (2005) (amending O.C.G.A. § 34-8-194 (1991)).

10. *Id.* In relevant part, O.C.G.A. section 34-8-194(1) provides:

For the week or fraction thereof in which the individual has filed an otherwise valid claim for benefits after such individual has left the most recent employer voluntarily without good cause in connection with the individual's most recent work. Good cause shall be determined by the Commissioner according to the circumstances in the case; provided, however, that leaving an employer to accompany a spouse who has been reassigned from one military assignment to another shall be deemed to be for good cause; provided, however, that the employer's account shall not be charged for any benefits paid out to the person who leaves to accompany a spouse reassigned from one military assignment to another.

O.C.G.A. § 34-8-194(1) (2004 & Supp. 2005).

11. Ga. H.R. Bill 520, § 9, Reg. Sess. (2005) (amending O.C.G.A. § 34-8-193 (1991)).

12. *Id.*

13. Ga. H.R. 520, § 5, Reg. Sess. (2005) (amending O.C.G.A. § 34-8-156 (1991)).

14. 42 U.S.C.A. § 1305 (2004 & Supp. 2005).

15. Ga. H.R. 520, § 3, Reg. Sess. (2005) (amending O.C.G.A. § 34-8-153 (1991)).

minimum unemployment tax rate of the transferee entity to a larger amount of employees; or (2) when a new employer takes over an entity to merely acquire its low or minimum unemployment tax rate instead of the new employer rate.<sup>16</sup> In the past, such actions resulted in losses to the State Unemployment Insurance Trust Fund and unfairly shifted the costs to other employers across the state.<sup>17</sup>

The SUTA-Dumping amendments to O.C.G.A. section 34-8-153 consisted of the addition of two new subsections.<sup>18</sup> Subsection (g)(1) eliminates the first type of SUTA-dumping by providing that if, at the time of transfer, the former employer and the transferee employer are under common control or management, the transferred entity's rate of contribution shall be transferred to the transferee entity.<sup>19</sup> The rate of contribution for the combined entity is immediately recalculated and is effective as of the date of transfer.<sup>20</sup> Subsection (g)(2) attempts to eliminate the second type of SUTA-dumping. If the commissioner of labor determines, based on statutory factors, that the new employer acquired the business solely or primarily for the purpose of obtaining a lower rate of contribution, then the new employer shall be assigned the statutory new employer rate under O.C.G.A. section 34-8-151.<sup>21</sup>

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16. *SUTA Dumping Prevention Act of 2004: Hearing Before the Subcomm. on Human Resources of the H. Comm. on Ways and Means*, 109th Cong. 2 (2005) (statement of The Honorable Mason Bishop, Deputy Assistant Secretary, Employment and Training Administration, U.S. Department of Labor).

17. *Id.* at 6 ("We . . . estimate that the proposals would produce indirect tax reductions of \$2.856 billion over 10 years.").

18. Ga. H.R. Bill 520, § 3, Reg. Sess. (2005) (amending O.C.G.A. § 34-8-153 (1991)).

19. O.C.G.A. section 34-8-153(g)(1) provides:

(1) If an employer transfers its trade or business, or any portion thereof, to another employer and, at the time of the transfer, there is substantially common ownership, management, or control of the two employers then the rate of contributions attributable to the predecessor shall be transferred to the successor employer to whom such business is so transferred. The rates of contributions of both employers shall be recalculated and made effective immediately upon the date of the transfer of the trade or business.

O.C.G.A. § 34-8-153(g)(1) (2004 & Supp. 2005).

20. *Id.*

21. Ga. H.R. Bill 520, § 3, Reg. Sess. (2005) (amending O.C.G.A. section 34-8-153 (1991)). O.C.G.A. section 34-8-153(g)(2) provides:

(2) Whenever the successor is not already an employer at the time of the acquisition, the unemployment experience of the acquired business shall not be transferred to the successor if the Commissioner determines that the successor acquired the business solely or primarily for the purpose of obtaining a lower rate of contribution. Instead, the successor shall be assigned the new employer rate under Code Section 34-8-151. In determining whether the trade or business was acquired solely or primarily for the purpose of obtaining a lower rate of contributions, the Commissioner shall use objective factors which may include the

Subsection (h) provides for civil penalties, rate adjustments, and felony prosecution for those who knowingly violate, or attempt to violate O.C.G.A. section 34-8-153.<sup>22</sup>

### III. WRONGFUL TERMINATION

#### A. *Employment-at-Will*

The employment-at-will contract has at least two notable characteristics: first, either the employee or employer may terminate the employment relationship at any time, with or without cause; and second, upon the termination of the employment-at-will contract, the employee may not successfully maintain a wrongful termination claim.<sup>23</sup>

While the doctrine is gradually eroding in other jurisdictions,<sup>24</sup> O.C.G.A. section 34-7-1<sup>25</sup> provides that employment contracts in Georgia are at-will unless the parties implicitly or explicitly contract otherwise.<sup>26</sup> Generally, this means that in the absence of a specified length of employment, the relationship is employment-at-will.<sup>27</sup> Contract provisions specifying "permanent employment, employment for

following:

- (A) The cost of acquiring the trade or business;
- (B) Whether the successor actually continued the business enterprise of the acquired trade or business;
- (C) How long the acquired trade or business was continued; and
- (D) Whether or not a substantial number of new employees were hired for the performance of duties unrelated to the business activity conducted by the predecessor prior to acquisition.

O.C.G.A. § 34-8-153(g)(2) (2004 & Supp. 2005).

22. Ga. H.R. Bill 520, § 3, Reg. Sess. (2005) (amending O.C.G.A. § 34-8-153 (1991)).

23. JAMES W. WIMBERLY, JR., *GEORGIA EMPLOYMENT LAW* 20-21 (3d ed. 2000 & Supp. 2005).

24. See generally Amy Carlson, *States are Eroding At-Will Employment Doctrines: Will Pennsylvania Join the Crowd?*, 42 DUQ. L. REV. 511 (2004); Melanie Robin Galberry, *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); Cortlan H. Maddux, *Employers Beware! The Emerging Use of Promissory Estoppel as an Exception to Employment At Will*, 49 BAYLOR L. REV. 197 (1997); Mark A. Fahleson, *The Public Policy Exception to Employment At Will—When Should Courts Defer to the Legislature?* 72 NEB. L. REV. 956 (1993); Kimberly Anne Huffman, *Salt v. Applied Analytical, Inc.: Clarifying the Confusion in North Carolina's Employment-at-Will Doctrine*, 70 N.C. L. REV. 2087 (1992); Richard J. Pratt, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-at-Will Doctrine*, 139 U. PA. L. REV. 197 (1990).

25. O.C.G.A. § 34-7-1 (2004 & Supp. 2005).

26. *Id.*

27. See generally WIMBERLY, *supra* note 23, at 20-21.

life, or employment until retirement” are indefinite, and are therefore employment-at-will contracts.<sup>28</sup>

In *Balmer v. Elan Corp.*,<sup>29</sup> the Georgia Supreme Court reaffirmed this enduring principle, and further held that oral promises can neither modify the at-will status nor create an enforceable contract.<sup>30</sup> Elan, a pharmaceutical company previously cited by the Food and Drug Administration (“FDA”), had a pending inspection scheduled for May 2000. The plaintiffs, who were employed as lab analysts, alleged that Elan told them they would not be penalized if they cooperated with the FDA and, based on this promise, they cooperated. The FDA cited Elan for violations of quality control standards. In August 2000 the cooperating employees were fired because they allegedly lied to FDA inspectors. The employees sued Elan for breach of contract based upon the company’s alleged oral promises. The trial court granted Elan’s motion for summary judgment and the court of appeals affirmed.<sup>31</sup>

In reaching its decision, the supreme court noted that “[n]umerous Georgia cases have held that oral promises are not enforceable by at-will employees.”<sup>32</sup> The employees argued that because O.C.G.A. section 34-7-1 was merely a codification of the supreme court’s decision in *Margarahan v. Wright & Lamkin*,<sup>33</sup> the supreme court was *required* to look to foreign law for guidance.<sup>34</sup> While the court acknowledged that it *may* look to foreign authority when interpreting statutes created as a codification of common-law principles, the Georgia Supreme Court reaffirmed the rule that courts of this State will refuse to acknowledge any exceptions to the employment-at-will doctrine not encompassed by statute.<sup>35</sup> The Georgia Supreme Court affirmed the grant of summary

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28. *Id.* at 20.

29. 278 Ga. 227, 599 S.E.2d 158 (2004).

30. *Id.* at 230, 599 S.E.2d at 162.

31. *Id.* at 227-28, 599 S.E.2d at 160.

32. *Id.* at 228-29, 599 S.E.2d at 161 (citing *Ford Clinic, Inc. v. Potter*, 246 Ga. App. 320, 540 S.E.2d 275 (2000) (oral promise as to an employment contract for an indefinite period of time is not enforceable); *Moore v. BellSouth Mobility, Inc.*, 243 Ga. App. 674, 534 S.E.2d 133 (2000) (oral promises as to future events are not enforceable by at-will employees and cannot provide grounds for a breach of contract claim); *Alston v. Brown Transp. Corp.*, 182 Ga. App. 632, 356 S.E.2d 517 (1987) (oral promise of promotion unenforceable where the employment contract is terminable at-will)).

33. 83 Ga. 773, 10 S.E. 584 (1889).

34. *Balmer*, 278 Ga. at 229, 599 S.E.2d at 161 (emphasis added) (The Georgia rules of statutory construction concerning “statutes of non-statutory origin” provide “that when the Code section is a mere codification of the general law, and is not of original legislative enactment, decisions of other courts . . . *may be looked to.*” (emphasis in original) (citing *Sinclair v. Friedlander*, 197 Ga. 797, 800, 30 S.E.2d 398, 399-400 (1944)).

35. *Id.* at 229-30, 599 S.E.2d at 161-62 (emphasis added).

judgment, holding that an oral promise was neither an enforceable modification to the contract of an at-will employee nor a new, enforceable contract.<sup>36</sup>

### B. Breach of Employment Contracts

To form a valid employment contract, the basic rules of contracts apply: offer, acceptance, and consideration.<sup>37</sup> Further, an employment contract must contain a designation of the employee's place of employment, the period of employment (if not specified, then at-will),<sup>38</sup> the nature of services to be rendered, and the amount or type of compensation.<sup>39</sup> The terms of an employment contract must be sufficiently definite to be enforceable, and definitiveness is a question of law for the judge.<sup>40</sup>

When interpreting employment contracts, courts are guided by three general principles. If there is no ambiguity, the court will enforce the contract according to its terms and dismiss all technical or arbitrary rules of construction.<sup>41</sup> If the contract is ambiguous, however, then interpreting the terms is a question of law for the court.<sup>42</sup> If the court cannot negate the ambiguity after applying the statutory rules of construction, then the ambiguity will be resolved by a jury.<sup>43</sup>

In *Key v. Naylor, Inc.*,<sup>44</sup> the court of appeals was called upon to determine whether an employment contract was too indefinite to be enforceable. In that case, the plaintiff, a senior executive, alleged that the company chairman had made promises regarding promotions and stock ownership that extended beyond the terms of her contract for employment executed in 2000. Upon the chairman's death, his wife became the majority stockholder and appointed herself chairwoman of the board. As chairwoman, she demoted and later terminated the

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36. *Id.*, 599 S.E.2d at 162.

37. WIMBERLY, *supra* note 23, at 6-7.

38. *See supra* Section III(A).

39. WIMBERLY, *supra* note 23, at 6-7.

40. *Id.*

41. *Homer v. Bd. of Regents of the Univ. Sys. of Georgia*, 272 Ga. App. 683, 613 S.E.2d 205 (2005); *Mon Ami Int'l, Inc. v. Gale*, 264 Ga. App. 739, 741, 592 S.E.2d 83, 86 (2003) (citing *Atlanta Dev. v. Emerald Capital Inv., LLC*, 258 Ga. App. 472, 477, 574 S.E.2d 585, 589 (2002)).

42. *Mon Ami Int'l*, 264 Ga. App. at 741, 592 S.E.2d at 86.

43. *Homer*, 272 Ga. App. at 685-86, 613 S.E.2d at 207; *Mon Ami Int'l*, 264 Ga. App. at 741, 592 S.E.2d at 86.

44. 268 Ga. App. 419, 602 S.E.2d 192 (2004).



plaintiff, who sued for breach of employment contract and fulfillment of the now-deceased chairman's promise of company stock.<sup>45</sup>

In resolving the matter, the court of appeals held that an enforceable employment contract must contain language that is "sufficient to plainly and explicitly convey [sic] the agreement between the parties."<sup>46</sup> Georgia courts have held that the party relying on the contract has the burden of proving the contract's existence and its terms.<sup>47</sup> The court of appeals concluded that the employee's 2000 employment contract included indefinite statements regarding her salary, her duties, and the terms of her employment, which were essential elements of the contract.<sup>48</sup> The contract also lacked severability clauses, which may have rehabilitated the otherwise deficient contract.<sup>49</sup> The court further held that the promise of stock in the company was not enforceable because it was indefinite and in return for past consideration.<sup>50</sup> Thus, the court held the contract unenforceable, meaning the plaintiff's employment was effectively at-will.<sup>51</sup>

In *Botterbusch v. Preussag International*,<sup>52</sup> the court of appeals decided what effect, if any, a procedural flaw in termination proceedings would have on the validity of a contract containing automatic extension provisions.<sup>53</sup> In *Botterbusch* an executive of a German company had an employment contract that provided for a five-year term. The contract also provided that if the five-year term was not terminated, his employment would "be extended thereafter automatically for an additional period to expire at such time as [the employee] reaches 65 years of age, . . . at which time [the employee's] employment shall be terminated."<sup>54</sup> Further, the employee's contract provided for termination "without cause 'upon written notice given not less than two hundred seventy (270) days prior to such termination.'"<sup>55</sup> The employer did not honor the notice period, firing the employee without cause and indicating

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45. *Id.* at 420, 422-23, 602 S.E.2d at 194-95.

46. *Id.* at 421, 602 S.E.2d at 195.

47. *Id.* (citing *Jackson v. Easters*, 190 Ga. App. 713, 714, 379 S.E.2d 610, 611 (1989)).

48. *Id.*

49. *Id.* at 423, 602 S.E.2d at 196.

50. *Id.* at 425-26, 602 S.E.2d at 197-98.

51. *See id.* at 423, 602 S.E.2d at 196. The court of appeals was also called upon to decide whether the trial court erred in finding that a subsequent written employment agreement was unenforceable. The court of appeals decided it did not need to reach that issue since the subsequent written agreement allowed the employer to terminate the employee "with just cause." *Id.*

52. 271 Ga. App. 190, 609 S.E.2d 141 (2004).

53. *Id.* at 194, 609 S.E.2d at 146.

54. *Id.* at 191, 609 S.E.2d at 143-44.

55. *Id.*, 609 S.E.2d at 144.

that the termination was effective immediately. Nevertheless, the employer continued regular pay during the 270-day notice period, which caused the employee no financial loss during that period of time. The employee sued for breach of contract and claimed: (1) that the termination was invalid due to the lack of notice, and thus his employment contract automatically renewed; and (2) that the employer breached a promise to provide additional retirement benefits. The employee based this last contention on various conversations he had with corporate officials. The trial court granted the employer's motion for summary judgment on both issues and the employee appealed.<sup>56</sup>

In regard to the employee's argument that his employment contract was invalidated due to the employer's failure to follow the notice of termination proceedings set forth in the contract, the court held that "failure to comply with the notice requirement constituted a procedural, rather than substantive, flaw in the termination."<sup>57</sup> The court of appeals relied upon the Georgia Supreme Court and held:

[I]f the employer were justified in terminating the employee under the contract, then the termination would have occurred even if the employer had followed the proper procedures. Thus, procedural flaws in the manner in which the termination was carried out will not warrant damages to compensate for losses that naturally result from a justified termination.<sup>58</sup>

Holding that the procedural breach had not caused the employee to suffer actual contractual loss but entitled him to recover the nominal cost of bringing suit, the court remanded the case.<sup>59</sup>

Finally, the court also held that a contract for retirement benefits did not exist.<sup>60</sup> Although the court recognized that the employee had multiple conversations regarding a supplemental retirement package, it held that there was no "meeting of the minds."<sup>61</sup> The lack of mutuality could be inferred from the absence of a final agreement regarding the financial amount of such benefits and the employee's awareness that any promise would have been contingent upon approval by the employer's board of directors.<sup>62</sup>

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56. *Id.* at 191-92, 609 S.E.2d at 144.

57. *Id.* at 194, 609 S.E.2d at 145-46 (citing *Savannah College of Art & Design, Inc. v. Nulph*, 265 Ga. 662, 663, 460 S.E.2d 792, 793 (1995)).

58. *Id.* at 194-95, 609 S.E.2d at 146 (quoting *Savannah College of Art & Design, Inc.*, 265 Ga. at 663, 460 S.E.2d at 792).

59. *Id.* at 195, 609 S.E.2d at 146-47.

60. *See id.* at 198, 609 S.E.2d at 148.

61. *Id.* at 197, 609 S.E.2d at 148.

62. *See id.*

Finally, in *Milhollin v. Salomon Smith Barney, Inc.*,<sup>63</sup> the court of appeals determined to what extent an employee could recover damages for stock not received from a restricted stock benefits plan.<sup>64</sup> Milhollin was an employee of Salomon Smith Barney. In 1996 Milhollin executed a stock benefit plan agreement that gave him the option to elect between zero and twenty-five percent of his salary to be paid in stock. Participants would receive stock at a twenty-five percent discount from the fair market value. The plan provided, however, that if the employee was terminated for cause or left voluntarily within two years of executing the plan, then he would forfeit his stock and the amount of salary he had agreed to divert to such stock. Milhollin voluntarily left the company before the end of the two-year window and then sued for the forfeited shares.<sup>65</sup>

Among Milhollin's many arguments, two are particularly instructive for labor and employment practitioners. First, he argued that the forfeiture violated O.C.G.A. section 34-7-2, which provides that an employer must pay the "full net amount of wages or earnings due the [employee] for the period for which the payment is made."<sup>66</sup> The court of appeals did not decide whether the forfeiture violated the section, because it held Milhollin's claim was untimely.<sup>67</sup> Specifically, the court relied on O.C.G.A. section 9-3-22, which requires: "[A]ll actions for the recovery of wages, overtime, or damages and penalties accruing under laws respecting the payment of wages and overtime shall be brought within two years after the right of action has accrued."<sup>68</sup>

Milhollin next argued that because his cause of action arose from written agreements, he was entitled to the six year statute of limitations applying to "an action under a written contract," but the court of appeals dismissed this argument.<sup>69</sup> The court observed that because his claims "were premised solely upon the provisions of [O.C.G.A. section] 34-7-2, the statutory wage law . . .," his cause of action was governed by the shorter statute of limitations applicable to that section.<sup>70</sup>

The court of appeals similarly dismissed Milhollin's forfeiture argument.<sup>71</sup> Although the court observed that forfeiture provisions are not favored in Georgia, it noted that forfeitures will not be relieved in

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63. 272 Ga. App. 267, 612 S.E.2d 72 (2005).

64. *Id.* at 272, 612 S.E.2d at 77.

65. *Id.* at 268-70, 612 S.E.2d at 74-75.

66. *Id.* at 270, 612 S.E.2d at 75.

67. *Id.*

68. *Id.*, 612 S.E.2d at 76 (quoting O.C.G.A. § 9-3-22 (1981 & Supp. 2005)).

69. *Id.* at 271, 612 S.E.2d at 76 (citing O.C.G.A. § 9-3-22).

70. *Id.*

71. *Id.*

the absence of a contractual ambiguity or infirmity.<sup>72</sup> The court held that the forfeiture provision at issue was free from any legal infirmity, and therefore upheld its enforcement.<sup>73</sup> The court further held that this forfeiture provision was not a covenant not to compete and therefore was not an unlawful restraint on trade, which would otherwise be subject to strict scrutiny.<sup>74</sup> The court held that because the forfeiture provision did not restrict Milhollin's ability to work elsewhere or impose a penalty for doing so, the provision was merely a lawful condition precedent to receipt of certain stock benefits.<sup>75</sup>

#### IV. MISCELLANEOUS EMPLOYMENT TORTS

##### A. *Negligent Hiring or Retention*

Employers are increasingly finding themselves the subjects of negligent employment practices claims. For example, in *Govea v. City of Norcross*,<sup>76</sup> the court affirmed the denial of the City of Chamblee's motion for summary judgment on Govea's claims for negligent hiring and negligent retention.<sup>77</sup> In *Govea* a police officer for the City of Chamblee served as a soccer coach for teenage boys in his off-duty capacity. While in uniform at a player's home, he allowed a thirteen-year-old boy to inspect his dismantled and unloaded sidearm. When the officer became distracted in conversation, the boy loaded the firearm and accidentally discharged it, which resulted in the boy's death.<sup>78</sup>

The officer had previously been an officer in the City of Norcross where he was voluntarily terminated. However, his file<sup>79</sup> contained numerous incidents when the officer had been inattentive or careless and had disregarded safety procedures, including leaving his sidearm on the front seat of an unlocked patrol car. In fact, the officer's decision to "voluntarily resign" resulted from an administrative investigation in which his supervisors were concerned about "negligent retention."<sup>80</sup>

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72. *Id.*

73. *Id.* at 272, 612 S.E.2d at 77.

74. *Id.*

75. *Id.*

76. 271 Ga. App. 36, 608 S.E.2d 677 (2004).

77. *Id.* at 48, 608 S.E.2d at 687.

78. *Id.* at 38-39, 608 S.E.2d at 681.

79. O.C.G.A. sections 35-8-1 to -25 (1981) are known as the Peace Officer Standards and Training ("POST") Act. The POST Act regulates record keeping and reporting by law enforcement agencies, requiring the submission of duplicate personnel records of police officers. These records are then released to any law enforcement agency considering the officer for employment. *Govea*, 271 Ga. App. at 40, 608 S.E.2d at 682.

80. *Govea*, 271 Ga. App. at 37-38, 608 S.E.2d at 680.

Thus, although his file indicated that the officer voluntarily resigned, the City of Lilburn declined to extend him a job upon reviewing his disciplinary history. Instead, he was hired by the City of Chamblee. Thereafter, the officer's pattern of poor judgment continued while in the employ of Chamblee, culminating in the incident that led to the litigation.<sup>81</sup>

The parents of the deceased boy brought suit against the City of Norcross and the City of Chamblee for negligent hiring and retention. Although the City of Chamblee argued that the officer's off-duty coaching activities were not related to his employment, the court rejected this argument and held that the officer acted within the "color of employment."<sup>82</sup> Color of employment is an easier standard to meet than the "scope of employment" standard that is required to establish vicarious liability under a respondeat superior theory.<sup>83</sup> The court held that the jury could conclude the officer was acting within the color of his employment because he used his status as a police officer to recruit members of the soccer team, was encouraged by the police chief to use the team members to gain intelligence, introduced himself as a police officer to team members' parents, and was in uniform at the time of the shooting.<sup>84</sup>

The court of appeals also held there was sufficient evidence from which a jury could find negligent retention.<sup>85</sup> An employer may be liable for negligent retention or hiring if the employer might reasonably have foreseen some injury resulting from hiring or retaining an employee, regardless of whether the employer could have anticipated the particular consequence.<sup>86</sup> Based on the officer's file, the court held that a jury could find it was foreseeable that the officer would again injure someone while on the job. The court stated:

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81. *Id.* at 38, 608 S.E.2d at 681.

82. *Id.* at 49, 608 S.E.2d at 688.

83. The court in *Georgia Interlocal Risk Management Agency v. Godfrey*, 273 Ga. App. 77, 83 n.24, 614 S.E.2d 201, 206 (2005) distinguished that case from *Govea*. The court held that while a police trainee was allowed to take a patrol car home at night to use for transportation, the trainee acted outside of the scope of his employment when he used a patrol car to commit a robbery and murder. *Id.* at 83 n.24, 614 S.E.2d at 206. Thus, the police department could not be held vicariously liable under the doctrine of respondeat superior. *Id.* The court noted that "liability based upon respondeat superior is not equivalent to liability based upon negligent hiring and retention." *Id.*

84. *Govea*, 271 Ga. App. at 49, 608 S.E.2d at 688.

85. *Id.*

86. *Id.* at 48, 608 S.E.2d at 687 (citing *Munroe v. Universal Health Serv., Inc.*, 277 Ga. 861, 863, 596 S.E.2d 604 (2004)).

The evidence concerning whether Chamblee negligently retained [the officer] is not plain and indisputable. And even assuming that Chamblee negligently retained [the officer], the record does not mandate a finding that Norcross could not have anticipated that a subsequent employer would have retained him even after having observed dissatisfactory performance. Norcross documented years of instances of misconduct by [the officer]. But before resorting to proposing termination, it exhausted other alternatives, including suspensions, reprimands, counseling, and a psychological evaluation. During that time, Norcross permitted [the officer] to continue working as a uniformed police officer. Thus, whether Chamblee committed negligent retention and whether Norcross might have foreseen that [the officer's] subsequent employer would do so are questions for the jury.<sup>87</sup>

In *Georgia State Board of Pardons & Paroles v. Finch*,<sup>88</sup> the court of appeals held that while a city may be liable for the torts of negligent retention or negligent hiring, a state agency is not liable for these torts.<sup>89</sup> The court also held that employment decisions, including the retention of an employee, are discretionary functions because such decisions “require the consideration of numerous factors and the exercise of deliberation and judgment.”<sup>90</sup> The court held that because Georgia has not waived its sovereign immunity for acts or omissions relating to the exercise of a discretionary function, the State of Georgia cannot be liable for negligent retention or negligent hiring.<sup>91</sup> The plaintiff, a parolee, also sought to implicate the Board of Pardons and Paroles for various torts allegedly committed by his parole officer. The court held that all of the parolee's alleged “losses” resulted from the parole officer's intentional acts for which the state could not be held liable.<sup>92</sup> Therefore, the court ruled that the Board was entitled to summary judgment on claims that it had negligently retained the parole officer.<sup>93</sup>

### *B. Tortious Interference with an Employment Relationship*

For a plaintiff to recover under a theory of tortious interference with an employment relationship, the plaintiff must establish that the defendant: “(1) acted improperly and without privilege, (2) acted

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87. *Id.* at 45, 608 S.E.2d at 685.

88. 269 Ga. App. 791, 605 S.E.2d 414 (2004).

89. *Id.* at 794, 605 S.E.2d at 416.

90. *Id.*

91. *Id.*, 605 S.E.2d at 416-17.

92. *Id.*

93. *Id.*, 605 S.E.2d at 417.

purposely and with malice with the intent to injure, (3) induced a third party or parties not to enter into or continue a business relationship with the plaintiff, and (4) caused the plaintiff financial injury.<sup>94</sup> To be liable for tortious interference with an employment relationship, a defendant must also be a stranger to the relationship giving rise to the cause of action.<sup>95</sup> During the survey period, only two significant cases involving tortious interference with an employment relationship arose.

In *Tidikis v. Network for Medical Communications & Research LLC*,<sup>96</sup> the court of appeals was asked to decide whether a corporation that had a financial interest in an employer could be held liable when it encouraged the employer to terminate an executive with whom it disagreed. The plaintiff, Frank Tidikis, was the former CEO of Network for Medical Communications & Research, LLC ("NMCR"). In 2002 NMCR was recapitalized by American Capital Strategies Inc. ("ACS") and ACS became a fifty percent owner in the corporation. Thereafter, NCMR began negotiating with a third corporation for the purchase of NCMR. Tidikis would have received approximately \$1.7 million as a result of the transaction. In March 2003 the plaintiff, in his capacity as a member of the board of managers, registered the lone vote against a proposal for a "special distribution" from NMCR to ACS. Months later, the plaintiff was placed on administrative leave pending an investigation into alleged misconduct as CEO of NMCR. The plaintiff filed suit against NMCR, ACS, and others. The trial court granted a motion to dismiss the claims against ACS, and the plaintiff appealed.<sup>97</sup>

On appeal, the issue was whether ACS was a "stranger" to Tidikis's employment contract, which would allow him to sustain a cause of action for intentional interference with contractual relations. Tidiki's cause of action would be based upon his allegation that ACS induced NMCR to fire him and interfered with his prospective employment at the third corporation.<sup>98</sup> Affirming the trial court, the court of appeals observed, "[t]he exercise of an absolute legal right is not and cannot be considered an interference with a contractual or potential contractual relationship,' because privilege includes legitimate economic interests of the defendant or a legitimate relationship of the alleged interloper or meddler to the

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94. *Wilson v. City of Sardis*, 264 Ga. App. 178, 179-80, 590 S.E.2d 383, 385 (2003) (quoting *Renden, Inc. v. Liberty Real Estate Ltd. P'ship III*, 213 Ga. App. 333, 334, 444 S.E.2d 814, 817 (1994)).

95. *Cox v. City of Atlanta*, 266 Ga. App. 329, 332, 596 S.E.2d 785, 788 (2004).

96. 2005 WL 1054964 (Ga. App. May 6, 2005).

97. *Id.* at \*1-\*2, \*4.

98. *Id.* at \*4.

contract.<sup>99</sup> Thus, the court of appeals held that where a “defendant has a financial interest in one of the parties to the contract or in the contract, the defendant is not a stranger to the contract or business relationship, even though it is not a signatory to the contract.”<sup>100</sup> ACS was not a stranger because ACS was the majority stockholder in NMCR, and Tidiki’s prospective employment was contingent on his termination by ACS.<sup>101</sup> Thus, ACS could not be held liable for tortious interference with employment or tortious interference with prospective employment.<sup>102</sup>

In *Batayias v. Kerr-McGee Corp.*,<sup>103</sup> the court of appeals concluded that no malice existed when a company forbade a former employee from working on its property.<sup>104</sup> Kerr-McGee employed Consolidated Mechanical as an on-site welding contractor. One of Consolidated Mechanical’s employees, Batayias, had formerly been an employee of Kerr-McGee. Batayias previously entered into a settlement agreement in a lawsuit he initiated at the termination of his employment with Kerr-McGee. After discovering Batayias was once again working in its plant, Kerr-McGee informed Consolidated Mechanical that it did not want Batayias on its property. Kerr-McGee did not ask for Batayias to be fired or laid off—the employer claimed to only want him off its property “to protect the corporation from possible exposure to any kind of liability.”<sup>105</sup> Consolidated Mechanical complied with Kerr-McGee’s request but eventually laid Batayias off when he refused reassignment seventy miles away. Batayias brought suit alleging, *inter alia*, tortious interference by Kerr-McGee in his employment relationship with Consolidated Mechanical. The trial court granted summary judgment to Kerr-McGee, and the court of appeals affirmed.<sup>106</sup>

The court of appeals held that Kerr-McGee could not be liable for tortious interference with Batayias and Consolidated Mechanical’s employment relationship because the interference was neither malicious nor wrongful.<sup>107</sup> The court noted that there was no evidence of malice in Kerr-McGee’s conduct and that Kerr-McGee merely “was not

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99. *Id.* (quoting *Disaster Serv., Inc. v. ERC P’ship*, 228 Ga. App. 739, 741-42, 492 S.E.2d 526, 529 (1997)).

100. *Id.* (citing *Cox v. City of Atlanta*, 266 Ga. App. 329, 333, 596 S.E.2d 785, 788 (2004)).

101. *Id.*

102. *Id.* at \*4-\*5.

103. 267 Ga. App. 848, 601 S.E.2d 174 (2004).

104. *Id.* at 850, 601 S.E.2d at 176.

105. *Id.* at 849, 601 S.E.2d at 175-76.

106. *Id.*

107. *Id.* at 850, 601 S.E.2d at 176.



comfortable with Batayias on the property and acted in what it believed was the best interests of the company."<sup>108</sup>

#### V. RESPONDEAT SUPERIOR

To hold an employer liable for a tort committed by an employee, the plaintiff must show that at the time of the incident the employee was engaged in the employer's business and not some personal matter of his own.<sup>109</sup> Understandably, the "scope of employment" prong is the subject of frequent litigation when an employee injures a third party. Several cases during the survey period illustrate the considerations important to the Georgia Courts of Appeals.

In *Betsill v. Scale Systems, Inc.*,<sup>110</sup> the court of appeals held that even though an employee may have acted to benefit the employer, an employer will not be held liable for the employee's conduct during his time off unless the employer gave a direct charge to undertake the action at issue.<sup>111</sup> The plaintiff, Mr. Betsill, was employed by Scale Systems, Inc. ("Scale Systems") as a parts and distribution manager. He worked regular business hours during the week, though he was on-call twenty-four hours a day at the time of the collision.<sup>112</sup>

On occasion, Mr. Betsill was required to deliver items to customers or field technicians. He was provided with a company truck for the deliveries, and he was also free to use it for personal reasons. Mr. Betsill's father-in-law, who worked from home, was a technician for Scale Systems. Mr. Betsill would make trips to drop off or pick up equipment in order to save his father-in-law the trip though he was not being paid hourly for the trips.<sup>113</sup>

In late January 2002, Scale Systems became worried about the possibility of theft from its parts room. A plan devised by upper management required that Mr. Betsill, and his co-workers, place a piece of tape over the door and then wait to see whether it was disturbed over the weekend. The idea that Mr. Betsill would come in over the weekend to check the status of the tape was mentioned, but Scale Systems never explicitly approved this plan or required him to do so.<sup>114</sup>

On Saturday, February 2, 2002, Betsill was on-call and loaded his children into his company truck. He drove to his father-in-law's house

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108. *Id.*

109. *CLO White Co. v. Lattimore*, 263 Ga. App. 839, 840, 590 S.E.2d 381, 382 (2003).

110. 269 Ga. App. 393, 604 S.E.2d 265 (2004).

111. *Id.* at 396, 604 S.E.2d at 268.

112. *Id.* at 394, 604 S.E.2d at 267.

113. *Id.*

114. *Id.* at 394-97, 604 S.E.2d at 267-68.

to pick up a computer that did not need to be returned for a couple of weeks and then drove to Scale Systems to check the tape over the parts room door. While driving from his father-in-law's house to Scale Systems, Mr. Betsill was involved in an accident which injured him and his children. Mrs. Betsill brought suit on behalf of the children against Scale Systems based on the doctrine of respondeat superior.<sup>115</sup> The trial court granted summary judgment to Scale Systems, and the court of appeals affirmed.<sup>116</sup>

Georgia law places the burden on the employer to show that a person involved in an accident while operating a company-owned vehicle was not acting within the scope of employment.<sup>117</sup> The court of appeals held that Scale Systems overcame this burden by showing that Mr. Betsill was not on a "special mission" at the time of the accident.<sup>118</sup> An employee who is commuting to work is deemed to be acting for his own purposes and outside the scope of his employment unless performing a special mission for the employer.<sup>119</sup> A special mission is defined as an errand or mission made at the direction of the employer.<sup>120</sup> The court held that Scale Systems did not request Mr. Betsill to pick up the computer from his father-in-law because the announcement regarding its return was not directed to him.<sup>121</sup> Neither was Mr. Betsill requested to pick up the computer or to deliver it on Saturday, two weeks before it was needed.<sup>122</sup> Further, the court held that although he had discussed checking the tape on the parts room door with upper management, he was never directed or expected to do so.<sup>123</sup> Because Betsill was not on duty and not performing a special mission, the court of appeals held his actions were not within the scope of his employment.<sup>124</sup> As a result, Scale Systems was not vicariously liable for Betsill's actions.<sup>125</sup>

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115. Georgia's family immunity doctrine barred any recovery on the children's behalf from the father, however, claims against a parent's employer under a theory of respondeat superior are not barred. *Id.* at 394 n.1, 604 S.E.2d at 267 (citing *Stapleton v. Stapleton*, 85 Ga. App. 728, 731-32, 70 S.E.2d 156, 159 (1952)).

116. *Id.*

117. *Id.* at 397, 604 S.E.2d at 269.

118. *Id.*, 604 S.E.2d at 268.

119. *Id.* at 395-96, 604 S.E.2d at 268. "On-call" status does not constitute evidence that an employee was working within the scope of his employment. *Id.* at 397, 604 S.E.2d at 268.

120. *Id.* at 396, 604 S.E.2d at 268.

121. *Id.*

122. *Id.*

123. *Id.* at 396-97, 604 S.E.2d at 268.

124. *Id.* at 397, 604 S.E.2d at 268.

125. *Id.*

In *Allen v. Atlas Cold Storage, Inc.*,<sup>126</sup> the court of appeals held that there are certain circumstances when an employer may be held liable for an employee's sexual misconduct when no evidence exists showing that the employee's actions were solely for his own sexual gratification.<sup>127</sup> After reports of drug use and sales on its premises, Atlas Cold Storage, Inc. ("Atlas") installed a surveillance camera system throughout its warehouse. The surveillance system was under the sole control of the manager of operations. Eventually, the system fell into disuse. The manager boasted to the employees that he could see everything they were doing, even stating, "[T]here's camera places where y'all don't know about."<sup>128</sup> When the manager received complaints from female employees that there appeared to be a camera above one of the stalls in the women's restroom, he responded in a joking though not dismissive manner. Additionally, the maintenance man mentioned to the manager that there was a video monitor in the ceiling above the manager's private restroom.<sup>129</sup>

The manager eventually left the employer. When Atlas later reactivated the security system with post-September 11th security concerns, a camera connected to a monitor, VCR, and modem was discovered above the women's restroom. Current and former employees, as well as customers, alleged invasion of privacy, intentional infliction of emotional distress, premises liability, and fraud against Atlas. The plaintiffs also brought claims against the manager individually.<sup>130</sup>

On appeal, Atlas argued that the trial court erred when it denied Atlas's motion for summary judgment regarding its liability for invasion of privacy, premises liability, and fraud. The court of appeals held that summary judgment was appropriate and reversed the trial court in part.<sup>131</sup> The court of appeals also affirmed the trial court's denial of Atlas's motion for summary judgment based on its liability for intentional infliction of emotional distress under a respondeat superior theory.<sup>132</sup> Although employers are not normally held responsible for their agents' sexual misconduct, the court of appeals noted, "there is no evidence that [the manager] acted solely for his personal sexual gratification in this case, as opposed to conducting an investigation of

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126. 272 Ga. App. 861, 613 S.E.2d 657 (2005).

127. *Id.* at 867-68, 613 S.E.2d at 663-64.

128. *Id.* at 862, 613 S.E.2d at 659.

129. *Id.* at 866, 613 S.E.2d at 659.

130. *Id.* at 862 n.2, 613 S.E.2d at 659.

131. *Id.* at 866, 613 S.E.2d at 662.

132. *Id.* at 868, 613 S.E.2d at 663.

suspected criminal conduct for his employer. At best, his motivation remains an open question of fact for the jury."<sup>133</sup>

## VI. RESTRICTIVE COVENANTS

### A. *Noncompete Agreements*

Agreements that place general restraints on trade, with the effect of lessening competition and encouraging monopolies, are void as against public policy.<sup>134</sup> Generally, noncompetition agreements are disfavored in contractual relations because they place restrictions on trade, thereby thwarting competition. Nonetheless, courts will uphold a noncompete agreement when the agreement merely places a partial restraint upon trade. For example, a written, noncompetition agreement which specifies time, territorial limitation, and activity restrictions is valid. Additionally, however, the agreement must be reasonable. Whether the agreement is reasonable is a question of law for the court to decide. The court will apply varying levels of scrutiny to determine whether the contract is reasonable, depending on 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. However, 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.<sup>135</sup> In applying the less stringent standard, the court may "blue pencil," i.e. rewrite or sever, provisions deemed overly broad or unreasonable.<sup>136</sup>

In *Dent Wizard International Corp. v. Brown*,<sup>137</sup> the court of appeals refused to enforce an employment contract's noncompetition covenant because it was facially over-broad.<sup>138</sup> In that case, an employee entered into an employment contract with Dent Wizard International Corp. ("Dent Wizard"), a paintless dent removal company. The contract contained restrictive covenants, including a covenant not to compete, a covenant not to solicit business, and a nonsolicitation of employees clause. The covenant not to compete prohibited the employee from working in a defined "trade area," which consisted of four counties, for two years following the termination of his employment with Dent

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133. *Id.*

134. See O.C.G.A. § 13-8-2 (1982 & Supp. 2003).

135. WIMBERLY, *supra* note 23, at 75-76.

136. *Id.* at 76.

137. 272 Ga. App. 553, 612 S.E.2d 873 (2005).

138. *Id.* at 556, 612 S.E.2d at 876.

Wizard.<sup>139</sup> Upon his resignation from Dent Wizard, the employee filed suit seeking a declaratory judgment on the issue of whether the restrictive covenants were invalid restrictions on trade. The trial court entered an interlocutory injunction in the employee's favor.<sup>140</sup>

On appeal, the court observed that whether a restraint on trade imposed by an employment contract is reasonable is a question of law.<sup>141</sup> Upholding the trial court's grant of an interlocutory injunction, the court concluded that the defined trade area was overly broad geographically because the employee had only worked for Dent Wizard in "two to three" of the four counties.<sup>142</sup> In so holding, the court of appeals stated the following:

Under such circumstances, the restriction will be considered overly broad on its face unless the record contains evidence demonstrating a strong justification for such a restriction. "While this Court will accept as prima facie valid a territory where the employee worked and the employer does business, a territory that is only where the employer does business but the employee did not work is overly broad on its face, absent strong justification for such protection, other than the desire not to compete with the former employee."<sup>143</sup>

Dent Wizard justified the territorial restriction on the basis that the employee's training had been a substantial investment, but neither the trial court nor the court of appeals were persuaded by this argument. The court noted that the employee no longer used the techniques learned on the job, and that there was an absence of evidence demonstrating that the techniques were unique.<sup>144</sup> Dent Wizard also claimed the restriction was justified because it protected customer relationships, but the court decided that this justification was also inadequate because the activity restrictions were not limited solely to customers served by the employee.<sup>145</sup> The court noted that the blue pencil doctrine is not followed in Georgia when construing employment contracts.<sup>146</sup> Therefore, because the court held that one restrictive covenant was unenforceable, the court was bound to hold that all the restrictive covenants

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139. *Id.* at 554, 612 S.E.2d at 874.

140. *Id.* at 553, 555, 612 S.E.2d at 874, 875.

141. *Id.* at 555-56, 612 S.E.2d at 875-76.

142. *Id.* at 556, 612 S.E.2d at 876.

143. *Id.* (citing *Hulcher Serv., Inc. v. R.J. Corman R.R. Co.*, 247 Ga. App. 486, 491, 543 S.E.2d 461, 466 (2001)).

144. *Id.*

145. *Id.* at 556-57, 612 S.E.2d at 876.

146. *Id.* at 557, 612 S.E.2d at 877.

contained in the contract were unenforceable.<sup>147</sup> The court had no need to decide whether the accompanying nonsolicitation clause would have been valid otherwise.<sup>148</sup>

### B. Nonsolicitation Agreements

In *Fellows v. All Star, Inc.*,<sup>149</sup> the court of appeals held that a nonsolicitation of customers clause was unreasonable in its territorial coverage.<sup>150</sup> In *Fellows* former employees of All Star, Inc. ("All Star") were prohibited from "contacting or soliciting any customer" for the purposes of providing them with any product or service obtainable from All Star.<sup>151</sup> The court held that a restrictive covenant contained in an employment agreement is considered a partial restraint on trade.<sup>152</sup> The court applied a three element test of duration, territorial coverage, and scope of activity, to determine whether the noncompete agreement was reasonable.<sup>153</sup> Striking down the clause at issue, the court of appeals noted that the agreement lacked specific territorial limits and did not limit restrictions to customers with whom the former employee had previously had contact.<sup>154</sup> The court's decision serves the public policy of "protect[ing] the employer's interest in preventing the employee from exploiting the personal relationship the employee has enjoyed with the employer's customers."<sup>155</sup> The court refused to enforce the restrictive covenant and remanded the case for a directed verdict on the breach of the noncompete agreement claims.<sup>156</sup>

Likewise, in *Palmer & Cay, Inc. v. Lockton Companies, Inc.*,<sup>157</sup> the court of appeals refused to enforce or modify a nonsolicitation of customers agreement that barred two former employees from soliciting any of the customers of the company who were served by the employees during the term of their employment.<sup>158</sup> Affirming the decision of the trial court, the court of appeals held that the covenant was over-broad in scope and unenforceable because it would have prevented the former employees from conducting business with former customers of Palmer &

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147. *Id.*

148. *Id.*

149. 272 Ga. App. 262, 612 S.E.2d 86 (2005).

150. *Id.* at 266, 612 S.E.2d at 89.

151. *Id.* at 264, 612 S.E.2d at 88.

152. *Id.* at 265, 612 S.E.2d at 88.

153. *Id.*

154. *Id.* at 266, 612 S.E.2d at 89.

155. *Id.* (quoting *W.R. Grace & Co. v. Mouyal*, 262 Ga. 464, 467, 422 S.E.2d 529 (1992)).

156. *Id.* at 267, 612 S.E.2d at 89-90.

157. Nos. A05A0272, A05A0273, 2005 WL 976994 (Ga. App. 2005).

158. *Id.* at \*2.

Cay, Inc. who may not have been active customers for a number of years.<sup>159</sup>

In striking down the nonsolicitation agreement, the court of appeals noted that its enforcement of nonsolicitation agreements relating to customers have usually been limited to "employment agreements which limit the time of customer contact to a certain period before the termination of employment."<sup>160</sup>

#### VII. CONCLUSION

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

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159. *Id.*

160. *Id.*