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Amendment Gives Georgia Courts More Authority Over Non-Competes

On November 2, Georgia voters approved by a 2-1 margin a constitutional amendment (Amendment 1) that represents a dramatic change in Georgia law regarding the enforceability of non-compete agreements. The amendment was proposed on the ballot as follows:

Shall the Constitution of Georgia be amended so as to make Georgia more economically competitive by authorizing legislation to uphold reasonable competitive agreements?

By passing this amendment, voters essentially gave effect to a statute that was passed in 2009 regarding restrictive covenants. As a result, employers who previously may not have used non-compete agreements may now want to reconsider them, and employers who have been using such agreements should consider revising their current contracts. In fact, revision now may be beneficial because the new act applies only to contracts entered into after November 2, 2010.

Historically, Georgia's courts have taken a relatively restrictive view of what constitutes reasonable duration, geographic and scope limitations in non-compete agreements, and Georgia courts have almost categorically refused to "blue pencil" (*i.e.*, delete certain portions of) overly broad agreements. Agreements found to be overly broad were simply declared unenforceable. The Georgia Constitution was understood to prohibit the General Assembly from taking steps to change Georgia law.

Post-amendment, employers may want to consider including restrictive covenants in contracts for certain key employees, such as directors, managers, officers, employees who have specialized skills or customer contacts or those involved with proprietary information, including research and development staff. Additionally, the statute will permit broader use of non-solicitation agreements. Finally, the statute provides for presumptively reasonable time limits for purposes of enforcement of non-competition agreements—in the case of former employees, two years is presumptively reasonable.

FOR MORE INFORMATION

The change in Georgia law and its effect on individual companies will vary on a case-by-case basis. Thompson Hine has many lawyers experienced in litigation and employment law who can help analyze the change and its implications for businesses.



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