

House Bill 667

By: Representatives Levitas of the 82nd, Chambers of the 81st, Coan of the 101st, Hill of the 21st, Lunsford of the 110th, and others

A BILL TO BE ENTITLED
AN ACT

1 To amend Chapter 8 of Title 13 of the Official Code of Georgia Annotated, relating to illegal
2 and void contracts generally, so as to provide that reasonable restrictive covenants are valid
3 restraints of trade or commerce; to provide for related matters; to provide for an effective
4 date and applicability; to repeal conflicting laws; and for other purposes.

5 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

6 style="text-align:center">**SECTION 1.**

7 Chapter 8 of Title 13 of the Official Code of Georgia Annotated, relating to illegal and void
8 contracts generally, is amended by adding a new Code section as follows:

9 "13-8-2.2.

10 (a) Notwithstanding any other provision of this chapter, enforcement of contracts that
11 restrict or prohibit competition during or after the term of restrictive covenants, so long as
12 such contracts are reasonable in time, area, and line of business, is not prohibited. In any
13 action concerning enforcement of a restrictive covenant:

14 (1) A court shall not enforce a restrictive covenant unless it is set forth in a writing
15 signed by the person against whom enforcement is sought;

16 (2) The person seeking enforcement of a restrictive covenant shall plead and prove the
17 existence of one or more legitimate business interests justifying the restrictive covenant.

18 The term 'legitimate business interest' includes, but is not limited to:

19 (A) Trade secrets, as defined by Code Section 10-1-761 et seq.;

20 (B) Valuable confidential business or professional information that otherwise does not
21 qualify as trade secrets;

22 (C) Substantial relationships with specific prospective or existing customers, patients,
23 or clients;

24 (D) Customer, patient, or client goodwill associated with:

25 (i) An ongoing business or professional practice, by way of trade name, trademark,
26 service mark, or 'trade dress';

1 (ii) A specific geographic location; or

2 (iii) A specific marketing or trade area; and

3 (E) Extraordinary or specialized training; and

4 (3) Any restrictive covenant not supported by a legitimate business interest is unlawful
5 and is void and unenforceable.

6 (b) A person seeking enforcement of a restrictive covenant also shall plead and prove that
7 the contractually specified restraint is reasonably necessary to protect the legitimate
8 business interest or interests justifying the restriction. If a person seeking enforcement of
9 the restrictive covenant establishes prima facie that the restraint is reasonably necessary,
10 the person opposing enforcement has the burden of establishing that the contractually
11 specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect
12 the established legitimate business interest or interests.

13 (c) If a contractually specified restraint is overbroad, overlong, or otherwise not reasonably
14 necessary to protect the legitimate business interest or interests, a court shall modify the
15 restraint and grant only the relief reasonably necessary to protect such interest or interests.

16 (d) In determining the reasonableness in time of a postterm restrictive covenant not
17 predicated upon the protection of trade secrets, a court shall apply the following rebuttable
18 presumptions:

19 (1) In the case of a restrictive covenant sought to be enforced against a former employee,
20 agent, or independent contractor, and not associated with the sale of all or a part of:

21 (A) The assets of a business or professional practice;

22 (B) The shares of a corporation;

23 (C) A partnership interest;

24 (D) A limited liability company membership; or

25 (E) An equity interest, of any other type, in a business or professional practice,

26 a court shall presume to be reasonable in time any restraint six months or less in duration
27 and shall presume to be unreasonable in time any restraint more than two years in
28 duration;

29 (2) In the case of a restrictive covenant sought to be enforced against a former
30 distributor, dealer, franchisee, or licensee of a trademark or service mark and not
31 associated with the sale of all or a part of:

32 (A) The assets of a business or professional practice;

33 (B) The shares of a corporation;

34 (C) A partnership interest;

35 (D) A limited liability company membership; or

36 (E) An equity interest, of any other type, in a business or professional practice,

1 a court shall presume to be reasonable in time any restraint one year or less in duration
2 and shall presume to be unreasonable in time any restraint more than three years in
3 duration; and

4 (3) In the case of a restrictive covenant sought to be enforced against the seller of all or
5 a part of:

6 (A) The assets of a business or professional practice;

7 (B) The shares of a corporation;

8 (C) A partnership interest;

9 (D) A limited liability company membership; or

10 (E) An equity interest, of any other type, in a business or professional practice,

11 a court shall presume to be reasonable in time any restraint three years or less in duration
12 and shall presume to be unreasonable in time any restraint more than seven years in
13 duration. All such presumptions shall be rebuttable presumptions.

14 (e) In determining the reasonableness in time of a postterm restrictive covenant predicated
15 upon the protection of trade secrets, a court shall presume to be reasonable in time any
16 restraint of five years or less and shall presume to be unreasonable in time any restraint of
17 more than ten years. All such presumptions shall be rebuttable presumptions.

18 (f) The court shall not refuse enforcement of a restrictive covenant on the ground that the
19 person seeking enforcement is a third-party beneficiary of such contract or is an assignee
20 or successor to a party to such contract, provided:

21 (1) In the case of a third-party beneficiary, the restrictive covenant expressly identified
22 the person as a third-party beneficiary of the contract and expressly stated that the
23 restrictive covenant was intended for the benefit of such person; and

24 (2) In the case of an assignee or successor, the restrictive covenant expressly authorized
25 enforcement by a party's assignee or successor.

26 (g) In determining the enforceability of a restrictive covenant, a court:

27 (1) Shall not consider any individualized economic or other hardship that might be
28 caused to the person against whom enforcement is sought;

29 (2) May consider as a defense the fact that the person seeking enforcement no longer
30 continues in business in the area or line of business that is the subject of the action to
31 enforce the restrictive covenant only if such discontinuance of business is not the result
32 of a violation of the restriction;

33 (3) Shall consider all other pertinent legal and equitable defenses; and

34 (4) Shall consider the effect of enforcement upon the public health, safety, and welfare.

35 (h) A court shall construe a restrictive covenant in favor of providing reasonable protection
36 to all legitimate business interests established by the person seeking enforcement. A court

1 shall not employ any rule of contract construction that requires the court to construe a
2 restrictive covenant narrowly, against the restraint, or against the drafter of the contract.

3 (i) No court may refuse enforcement of an otherwise enforceable restrictive covenant on
4 the ground that the contract violates public policy unless such public policy is articulated
5 specifically by the court and the court finds that the specified public policy requirements
6 substantially outweigh the need to protect the legitimate business interest or interests
7 established by the person seeking enforcement of the restraint.

8 (j) A court shall enforce a restrictive covenant by any appropriate and effective remedy,
9 including, but not limited to, temporary and permanent injunctions. The violation of an
10 enforceable restrictive covenant creates a presumption of irreparable injury to the person
11 seeking enforcement of a restrictive covenant. No temporary injunction shall be entered
12 unless the person seeking enforcement of a restrictive covenant gives a proper bond, and
13 the court shall not enforce any contractual provision waiving the requirement of an
14 injunction bond or limiting the amount of such bond.

15 (k) In the absence of a contractual provision authorizing an award of attorney's fees and
16 costs to the prevailing party, a court may award attorney's fees and costs to the prevailing
17 party in any action seeking enforcement of, or challenging the enforceability of, a
18 restrictive covenant. A court shall not enforce any contractual provision limiting the
19 court's authority under this subsection.

20 (l) Nothing in this Code section shall be construed or interpreted to legalize or make
21 enforceable any restraint of trade or commerce otherwise illegal or unenforceable under the
22 laws of the United States or of this state.

23 (m) This Code section shall apply prospectively, and it shall not apply in actions
24 determining the enforceability of restrictive covenants entered into before July 1, 2007."

25 **SECTION 2.**

26 This Act shall become effective on July 1, 2007, and shall apply to restrictive covenants
27 entered into on or after that date.

28 **SECTION 3.**

29 All laws and parts of laws in conflict with this Act are repealed.