

House Bill 173

By: Representatives Levitas of the 82<sup>nd</sup>, Coan of the 101<sup>st</sup>, Smith of the 131<sup>st</sup>, Parrish of the 156<sup>th</sup>, Bearden of the 68<sup>th</sup>, 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 or void contracts generally, so as to repeal Code Section 13-8-2.1, relating to contracts in  
3 partial restraint of trade; to provide a statement of legislative findings; to define certain  
4 terms; to provide for applicability; to provide for the enforcement of contracts that restrict  
5 or prohibit competition in certain commercial agreements; to provide for the judicial  
6 enforcement of such provisions; to provide for the modification of such provisions; to  
7 provide for rebuttable presumptions; to provide for related matters; to provide for a  
8 contingent effective date, applicability, and automatic repeal; to repeal conflicting laws; and  
9 for other purposes.

10 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

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

12 Chapter 8 of Title 13 of the Official Code of Georgia Annotated, relating to illegal and void  
13 contracts generally, is amended by revising subsection (a) of Code Section 13-8-2, relating  
14 to contracts contravening public policy, as follows:

15 "(a) A contract ~~which~~ that is against the policy of the law cannot be enforced. Contracts  
16 deemed contrary to public policy include but are not limited to:

- 17 (1) Contracts tending to corrupt legislation or the judiciary;  
18 (2) Contracts in general restraint of trade, as distinguished from contracts ~~in partial~~  
19 ~~restraint of trade as provided for in Code Section 13-8-2.1~~ which restrict certain  
20 competitive activities, as provided in Article 4 of this chapter;  
21 (3) Contracts to evade or oppose the revenue laws of another country;  
22 (4) Wagering contracts; or  
23 (5) Contracts of maintenance or champerty."

24 **SECTION 2.**

25 Said chapter is further amended by repealing Code Section 13-8-2.1, relating to contracts in  
26 partial restraint of trade, which reads as follows:

27 "13-8-2.1.

28 (a) Contracts that restrain in a reasonable manner any party thereto from exercising any  
29 trade, business, or employment are contracts in partial restraint of trade and shall not be  
30 considered against the policy of the law, and such partial restraints, so long as otherwise  
31 lawful, shall be enforceable for all purposes. Without limiting the generality of the  
32 foregoing, contracts of the type described in subsections (b) through (d) of this Code  
33 section are considered to be reasonable.

34 (b)(1) As used in this subsection, the term:

35 (A) 'Affiliate' means: (i) a person or entity that directly, or indirectly through one or  
36 more intermediaries, controls or is controlled by or is under common control with a  
37 specified person or entity; (ii) any entity of which a specified person is an officer,  
38 director, or partner or holds an equity interest or ownership position that accounts for  
39 25 percent or more of the voting or profits interest of such entity; (iii) any trust or other  
40 estate in which the specified person or entity has a beneficial interest of 25 percent or  
41 more or as to which such person or entity serves as trustee or in a similar fiduciary  
42 capacity; and (iv) the spouse, lineal ancestors, lineal descendants, and siblings of the  
43 specified person, as well as their spouses.

44 (B) 'Business' means any line of trade or business involved in a sale.

45 (C) 'Buyer' means any person or entity, including any successor-in-interest to such an  
46 entity, that acquires a business or a controlling interest in a business.

47 (D) 'Controlling interest' means any equity interest or ownership participation held by  
48 a person or entity with respect to a business: (i) which accounts for 25 percent or more  
49 of the voting or profits interest of the business prior to the sale, alone or in combination  
50 with the interest or participation held by affiliates of such person or entity; or (ii) the  
51 sale of which results in the owner thereof receiving consideration worth at least  
52 \$500,000.00, inclusive of any consideration received for the sale of business covenant.

53 (E) 'Sale' means any sale or transfer of the good will or substantially all of the assets  
54 of a business or any sale or transfer of a controlling interest in a business, whether by  
55 sale, exchange, redemption, merger, or otherwise.

56 (F) 'Sale of business covenant' means any agreement described in paragraph (2) of this  
57 subsection or any substantially equivalent agreement.

58 (G) 'Seller' means any person or entity, including any successor-in-interest to such an  
59 entity, that is: (i) an owner of a controlling interest; (ii) an executive employee, officer,  
60 or manager of the business who receives, as a minimum, consideration in connection

61 with either the sale or the sale of business covenant that is worth the equivalent of such  
62 person's most recent annual base salary or is in the form of a commitment of continued  
63 employment for a period of at least one year; or (iii) an affiliate of a person or entity  
64 described in division (i) of this subparagraph; provided, however, that each sale of  
65 business covenant shall be binding only on the person or entity entering into such  
66 covenant, its successors-in-interest, and, if so specified in the covenant, any entity that  
67 directly or indirectly through one or more intermediaries is controlled by or is under  
68 common control of such person or entity.

69 (2) A seller may agree in writing for the benefit of a buyer to refrain from:

70 (A) Carrying on or engaging in any activity competitive with the business; or

71 (B) Soliciting or accepting business from the business's customers which were  
72 customers at or prior to the time of the sale, including actively sought prospective  
73 customers, for purposes of providing products or services competitive with those  
74 provided by the business

75 within the geographic area or areas where the business conducts its operations at the time  
76 of the sale, including any area where the business's customers and actively sought  
77 prospective customers are present and including any area into which the business is  
78 reasonably expected to expand, provided that such activity, business, and area must be  
79 described in such writing. A sale of business covenant may, if reasonable to protect the  
80 interests of the buyer or the good will of the business, be worldwide. A sale of business  
81 covenant may extend for any period of time that is reasonable to protect the interests of  
82 the buyer or the good will of the business. Each sale of business covenant shall, however,  
83 be considered to terminate at the time the business is discontinued or either the seller,  
84 including all successors-in-interest, or the buyer, including all successors-in-interest,  
85 ceases to exist.

86 (c)(1) As used in this subsection, the term:

87 (A) 'Business' means any line of trade or business conducted by an employer.

88 (B) 'Employee' means: (i) an executive employee, officer, manager, or key employee;  
89 (ii) research and development personnel or other persons or entities, including  
90 independent contractors, in possession of confidential information that is important to  
91 the business; (iii) any other person or entity, including an independent contractor, in  
92 possession of selective or specialized skills, learning, or abilities or customer contacts  
93 or customer information; or (iv) any party to a partnership agreement, franchise,  
94 distributorship, or license agreement or sales agent, broker, representative, or  
95 supervisor. The term 'employee' shall not include, however, any employee who lacks  
96 selective or specialized skills, learning, customer contacts, or abilities.

97 (C) 'Employer' means any corporation, partnership, proprietorship, or other  
98 organization, including any successor-in-interest to such an entity, that conducts a  
99 business or any person or entity that directly or indirectly owns an equity interest or  
100 ownership participation in such an entity that accounts for 50 percent or more of the  
101 voting or profits interest of such entity.

102 (D) 'Material contact' exists between an employee and each customer or potential  
103 customer: (i) with whom the employee dealt; (ii) whose dealings with the employer  
104 were coordinated or supervised by the employee; (iii) about whom the employee  
105 obtained confidential information in the ordinary course of business as a result of such  
106 employee's association with the employer; or (iv) who receives products or services  
107 authorized by the employer, the sale or provision of which results or resulted in  
108 compensation, commissions, or earnings for the employee within two years prior to the  
109 date of the employee's termination.

110 (E) 'Post-employment covenant' includes any agreement described in paragraphs (2)  
111 through (4) of this subsection or any substantially equivalent agreement.

112 (F) 'Products or services' means anything of commercial value, including without  
113 limitation goods; personal, real, or intangible property; services; financial products or  
114 services; business opportunities or assistance; or any other object or aspect of business  
115 or the conduct thereof.

116 (G) 'Termination' means the termination of an employee's engagement with an  
117 employer, whether with or without cause and upon the initiative of either party,  
118 provided that any possible inequity that results from the discharge of an employee  
119 without cause or in violation of a contractual or other legal obligation of the employer  
120 may be considered as a factor affecting the choice of an appropriate remedy or, if the  
121 restraint as a whole is rendered unreasonable, the unenforceability thereof. For  
122 purposes of this definition, 'the discharge of an employee without cause' does not  
123 include (i) a termination of a partnership agreement, franchise, distributorship, or  
124 license agreement or a sales agent, broker, representative, or supervisor agreement in  
125 accordance with the terms of the agreement or upon the completion or expiration of the  
126 agreement, (ii) any termination under retirement programs of the employer, (iii) any  
127 termination that follows the employee's refusal to accept an offer of continued  
128 employment on terms and conditions at least as favorable to the employee as those  
129 previously in effect, or (iv) any termination under circumstances where the employee  
130 remains or becomes entitled to receive earnings, commissions, or benefits that serve as  
131 compensation, at least in part, for the employee's compliance with the post-termination  
132 covenants.

133 (2) An employee may agree in writing for the benefit of an employer to refrain, for a  
134 stated period of time following termination, from conducting activity that is competitive  
135 with the activities the employee conducted for the employer within the geographic area  
136 or areas where the employee conducted such activities at or within a reasonable period  
137 of time prior to termination, provided that such activity and area must be described in  
138 such writing. The geographic area in which an employee works may include any area  
139 where any operations performed, supervised, or assisted in by the employee were  
140 conducted and any area where customers or actively sought prospective customers of the  
141 business with whom the employee had material contact are present.

142 (3) An employee may agree in writing for the benefit of an employer to refrain, for a  
143 stated period of time following termination, from soliciting or accepting, or attempting  
144 to solicit or accept, directly or by assisting others, any business from any of such  
145 business's customers, including actively sought prospective customers, with whom the  
146 employee had material contact during his employment for purposes of providing products  
147 or services that are competitive with those provided by the employer's business. No  
148 express reference to geographic area or the types of products or services considered to be  
149 competitive shall be required in order for the restraint to be enforceable. Any reference  
150 to a prohibition against 'soliciting or accepting business from customers,' or similar  
151 language, shall be adequate for such purpose and narrowly construed to apply only to:  
152 (A) such of the business's customers, including actively sought prospective customers,  
153 with whom the employee had material contact; and (B) products and services that are  
154 competitive with those provided by the employer's business.

155 (4) An employee may agree in writing for the benefit of an employer to refrain, for a  
156 stated period of time following termination, from recruiting or hiring, or attempting to  
157 recruit or hire, directly or by assisting others, any other employee of the employer or its  
158 affiliates. No express reference to geographic area shall be required. Any reference to  
159 a prohibition against recruiting or hiring, or attempting to recruit or hire, other employees  
160 shall be narrowly construed to apply only to other employees who are still actively  
161 employed by or doing business with the employer or its affiliates at the time of the  
162 attempted recruiting or hiring.

163 (5) To the extent so stated in the post-employment covenant, a post-employment  
164 covenant may provide that any violation of the restraint shall automatically toll and  
165 suspend the period of the restraint for the amount of time that the violation continues,  
166 provided that the employer seeks enforcement promptly after discovery of the violation.

167 (6) A duration of two years or less in the case of a restraint of the type described in  
168 paragraph (2) of this subsection, and three years or less in the case of a restraint of the

169 type described in paragraphs (3) and (4) of this subsection shall be presumed to be  
170 reasonable as the period of time stated for any post-employment covenant.

171 (d) Any restriction that operates during the term of an employment agreement, agency  
172 agreement, independent contractor agreement, partnership agreement, franchise,  
173 distributorship agreement, license, shareholders' agreement, or other ongoing business  
174 agreement shall not be considered unreasonable because it lacks any specific limitation  
175 upon scope of activity, duration, or territory, so long as it promotes or protects the purpose  
176 or subject matter of the agreement or deters any potential conflict of interest.

177 (e)(1) Activities, products, or services that are competitive with the activities, products,  
178 or services of an employer may include activities, products, or services that are the same  
179 as or similar to the activities, products, or services of the employer. Whenever a  
180 description of activities, products and services, or areas is required by this Code section,  
181 any description that provides fair notice of the maximum reasonable scope of the restraint  
182 shall satisfy such requirement, even if the description is generalized or could possibly be  
183 stated more narrowly to exclude extraneous matters.

184 (2) In the case of a post-employment covenant entered into prior to termination, any  
185 good faith estimate of the activities, products and services, or areas that may be  
186 applicable at the time of termination shall also satisfy such requirement, even if such  
187 estimate is capable of including or ultimately proves to include extraneous activities,  
188 products and services, or areas. The post-employment covenant shall be construed  
189 ultimately to cover only so much of such estimate as relates to the activities actually  
190 conducted, the products and services actually offered, or the areas actually involved  
191 within a stated period of time prior to termination. Activities, products, or services shall  
192 be considered sufficiently described if a reference to the activities, products, or services  
193 is provided and qualified by the phrase 'of the type conducted, authorized, offered, or  
194 provided within one year prior to termination,' or similar language. Further, the phrase  
195 'the areas where the (employee) is working at the time of (termination)' shall be  
196 considered sufficient as a description of areas if the person or entity bound by the  
197 restraint can reasonably determine the maximum reasonable scope of the restraint at the  
198 time of termination.

199 (f)(1) Whenever a person or entity desires to verify the terms of any partial restraint in  
200 effect at any time, or to obtain a clarification of a restraint believed to be unclear, such  
201 person or entity may, at its option, demand such verification or clarification by delivering  
202 to the persons or entities that benefit from such restraint a written statement that contains:  
203 (A) if verification is sought, a request for a copy of each partial restraint in effect between  
204 the parties; or (B) if clarification is sought, a description of the clarification requested;  
205 and (C) in all cases, the following statement: 'THIS DEMAND IS MADE PURSUANT

206 TO CODE SECTION 13-8-2.1(f)(2) OF THE OFFICIAL CODE OF GEORGIA  
207 ANNOTATED AND REQUIRES A RESPONSE WITHIN 30 DAYS.'

208 (2) Within 30 days after such other persons or entities or their authorized representatives  
209 have received such demand in person, they shall respond by sending the person or entity  
210 bound by the restraint the requested information or, if clarification is considered to be  
211 unnecessary because the restraint is believed to be clear, a statement to that effect. In no  
212 event shall such a response be required to include confidential information or business  
213 strategies as part of any clarification.

214 (3) In the interest of reducing or eliminating any unclear or overbroad aspect of the  
215 restraint, the persons or entities that benefit from any existing restraint may provide the  
216 persons or entities bound by such restraint with a clarification or reformulation of the  
217 restraint, whether or not the clarification or reformulation was requested, so long as it is  
218 no broader than the terms of the original restraint. Any clarification or reformulation on  
219 lesser terms so provided by the persons or entities that benefit from the restraint shall  
220 supersede any conflicting terms of the restraint and be binding regardless of whether  
221 additional consideration is provided. The person or entity bound by the restraint may rely  
222 absolutely on such clarification or reformulation in complying with the terms of such  
223 restraint.

224 (4) Any failure or delay of the persons or entities that benefit from such restraint to  
225 respond to such a demand shall be considered as one factor by a court in determining how  
226 much of an unclear or overbroad restraint may be enforced as lawfully serving the  
227 business purposes and interests contemplated by the parties in their agreement. In  
228 addition, if the procedure provided for in this subsection is followed for the benefit of  
229 anyone who wishes to employ or do business with a person or entity, any subsequent  
230 enforcement of any restraint that was unknown, unclear, or overbroad but that is not  
231 properly identified, clarified, or reformulated by the persons or entities that benefit from  
232 the restraint following their receipt of such a demand shall be limited so as to avoid  
233 prejudice to the employment or business to which the unknown, unclear, or overbroad  
234 aspects of the restraint relate.

235 (g)(1) Every court of competent jurisdiction shall enforce through any appropriate  
236 remedy every contract in partial restraint of trade that is not against the policy of the law  
237 or otherwise unlawful. In the absence of extreme hardship on the part of the person or  
238 entity bound by such restraint, injunctive relief shall be presumed to be an appropriate  
239 remedy for the enforcement of the contracts described in subsections (b) through (d) of  
240 this Code section. If any portion of such restraint is against the policy of the law in any  
241 respect but such restraint, considered as a whole, is not so clearly unreasonable and  
242 overreaching in its terms as to be unconscionable, the court shall enforce so much of such

243 restraint as it determines by a preponderance of the evidence to be necessary to protect  
 244 the interests of the parties that benefit from such restraint. Such a restraint shall be  
 245 subject to partial enforcement, whether or not it contains a severability or similar clause  
 246 and regardless of whether the unlawful aspects of such restraint are facially severable  
 247 from those found lawful.

248 (2) The enforceability of any partial restraint of trade shall be determined and shall be  
 249 enforced independently of the enforceability of any other covenant or part thereof  
 250 contained in the same contract or arrangement.

251 (3) Contractual terms that provide for a loss or forfeiture of rights or benefits conditioned  
 252 upon any specified act or event shall not be considered a restraint of trade. The fact that  
 253 any such loss or forfeiture provision is contained in the same agreement or contract with  
 254 an otherwise valid partial restraint of trade shall not impair the validity or enforceability  
 255 of either such loss or forfeiture provision or such restraint, and the enforcement of either  
 256 term shall not serve as grounds for delaying or withholding enforcement of the other  
 257 term, including enforcement by injunctive relief. If a loss or forfeiture provision is  
 258 contained in an agreement or contract that also contains other terms that are determined  
 259 to be, in some respects, an unreasonable and unenforceable restraint of trade, such loss  
 260 or forfeiture provision shall nonetheless be enforceable to the extent it may lawfully serve  
 261 the purposes and interests of the parties that benefit from such provision. Such a loss or  
 262 forfeiture provision shall be subject to enforcement, whether or not it contains a  
 263 severability or similar clause, and regardless of whether the unlawful aspects of such  
 264 restraint are facially severable from those found to be unlawful."

265 **SECTION 3.**

266 Said chapter is further amended by adding a new article to read as follows:

267 "ARTICLE 4

268 13-8-50.

269 The General Assembly finds that reasonable restrictive covenants contained in employment  
 270 and commercial contracts serve the legitimate purpose of protecting legitimate business  
 271 interests and creating an environment that is favorable to attracting commercial enterprises  
 272 to Georgia and keeping existing businesses within the state. Further, the General Assembly  
 273 desires to provide statutory guidance so that all parties to such agreements may be certain  
 274 of the validity and enforceability of such provisions and may know their rights and duties  
 275 according to such provisions.

276 13-8-51.

277 As used in this article, the term:

278 (1) 'Affiliate' means:

279 (A) A person or entity that directly, or indirectly through one or more intermediaries,  
280 controls or is controlled by or is under common control with another person or entity;

281 (B) Any entity of which a person is an officer, director, or partner or holds an equity  
282 interest or ownership position that accounts for 25 percent or more of the voting rights  
283 or profit interest of such entity;

284 (C) Any trust or other estate in which the person or entity has a beneficial interest of  
285 25 percent or more or as to which such person or entity serves as trustee or in a similar  
286 fiduciary capacity; or

287 (D) The spouse, lineal ancestors, lineal descendants, and siblings of the person, as well  
288 as each of their spouses.

289 (2) 'Business' means any line of trade or business conducted by the seller or employer,  
290 as such terms are defined in this Code section.

291 (3) 'Confidential information' means data and information:

292 (A) Relating to the business of the employer, regardless of whether the data or  
293 information constitutes a trade secret as that term is defined in Article 1 of Chapter 10  
294 of Title 10;

295 (B) Disclosed to the employee or of which the employee became aware of as a  
296 consequence of the employee's relationship with the employer;

297 (C) Having value to the employer;

298 (D) Not generally known to competitors of the employer; and

299 (E) Which includes trade secrets, methods of operation, names of customers, price lists,  
300 financial information and projections, route books, personnel data, and similar  
301 information;

302 provided, however, that such term shall not mean data or information (A) which has been  
303 voluntarily disclosed to the public by the employer, except where such public disclosure  
304 has been made by the employee without authorization from the employer; (B) which has  
305 been independently developed and disclosed by others; or (C) which has otherwise  
306 entered the public domain through lawful means.

307 (4) 'Controlling interest' means any equity interest or ownership participation held by a  
308 person or entity with respect to a business that accounts for 25 percent or more of the  
309 voting rights or profit interest of the business prior to the sale, alone or in combination  
310 with the interest or participation held by affiliates of such person or entity.

311 (5) 'Employee' means:

312 (A) An executive employee;

313 (B) Research and development personnel or other persons or entities of an employer,  
314 including, without limitation, independent contractors, in possession of confidential  
315 information that is important to the business of the employer;

316 (C) Any other person or entity, including an independent contractor, in possession of  
317 selective or specialized skills, learning, or abilities or customer contacts or customer  
318 information who or that has obtained such skills, learning, abilities, contacts, or  
319 information by reason of having worked for an employer; or

320 (D) Any party to a partnership, franchise, distributorship, lease, or license agreement  
321 or sales agent, broker, or representative for or of such agreement.

322 Such term shall not include any employee who lacks selective or specialized skills,  
323 learning, abilities, customer contacts, or customer information.

324 (6) 'Employer' means any corporation, partnership, proprietorship, or other business  
325 organization, whether for profit or not for profit, including, without limitation, any  
326 successor in interest to such an entity, who or that conducts business or any person or  
327 entity who or that directly or indirectly owns an equity interest or ownership participation  
328 in such an entity accounting for 25 percent or more of the voting rights or profit interest  
329 of such entity.

330 (7) 'Executive employee' means a member of the board of directors, an officer, a key  
331 employee, a manager, or a supervisor of an employer.

332 (8) 'Key employee' means an employee who, by reason of the employer's investment of  
333 time, training, money, trust, exposure to the public, or exposure to customers, vendors,  
334 or other business relationships during the course of the employee's employment with the  
335 employer, has gained a high level of notoriety, fame, reputation, or public persona as the  
336 employer's representative or spokesperson or has gained a high level of influence or  
337 credibility with the employer's customers, vendors, or other business relationships or is  
338 intimately involved in the planning for or direction of the business of the employer or a  
339 defined unit of the business of the employer. Such term also means an employee in  
340 possession of selective or specialized skills, learning, or abilities or customer contacts or  
341 customer information who has obtained such skills, learning, abilities, contacts, or  
342 information by reason of having worked for the employer.

343 (9) 'Legitimate business interest' includes, but is not limited to:

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

345 (B) Valuable confidential information that otherwise does not qualify as a trade secret;

346 (C) Substantial relationships with specific prospective or existing customers, patients,  
347 vendors, or clients;

348 (D) Customer, patient, or client good will associated with:

- 349 (i) An ongoing business, commercial, or professional practice, including, but not  
350 limited to, by way of trade name, trademark, service mark, or trade dress;  
351 (ii) A specific geographic location; or  
352 (iii) A specific marketing or trade area; and  
353 (E) Extraordinary or specialized training.
- 354 (10) 'Material contact' means the contact between an employee and each customer or  
355 potential customer:
- 356 (A) With whom or which the employee dealt on behalf of the employer;  
357 (B) Whose dealings with the employer were coordinated or supervised by the  
358 employee;  
359 (C) About whom the employee obtained confidential information in the ordinary  
360 course of business as a result of such employee's association with the employer; or  
361 (D) Who receives products or services authorized by the employer, the sale or  
362 provision of which results or resulted in compensation, commissions, or earnings for  
363 the employee within two years prior to the date of the employee's termination.
- 364 (11) 'Modification' means a change, alteration, or amendment that introduces new  
365 language or elements into the details of a restrictive covenant, or cancels some of them,  
366 but which leaves the general purpose and effect of the subject matter of the covenant  
367 intact. Such term shall include, without limitation:
- 368 (A) Reforming a restrictive covenant which is otherwise unenforceable by reason of  
369 vagueness;  
370 (B) Severing or removing that part of a restrictive covenant that would otherwise make  
371 the entire restrictive covenant unenforceable; and  
372 (C) Enforcing the provisions of a restrictive covenant to the extent that the provisions  
373 are reasonable.
- 374 (12) 'Modify' means to make, to cause, or otherwise to bring about a modification.
- 375 (13) 'Products or services' means anything of commercial value, including, without  
376 limitation, goods; personal, real, or intangible property; services; financial products;  
377 business opportunities or assistance; or any other object or aspect of business or the  
378 conduct thereof.
- 379 (14) 'Restrictive covenant' means an agreement between two or more parties that exists  
380 to protect the first party's or parties' interest in property, confidential information,  
381 customer good will, business relationships, employees, or any other economic advantages  
382 that the second party has obtained for the benefit of the first party or parties or to which  
383 the second party has gained access in the course of his or her relationship with the first  
384 party or parties. Such restrictive covenants may exist within or ancillary to contracts  
385 between or among employers and employees, distributors and manufacturers, lessors and

386 lessees, partnerships and partners, employers and independent contractors, franchisors  
 387 and franchisees, and sellers and purchasers of a business or commercial enterprise and  
 388 any two or more employers.

389 (15) 'Sale' means any sale or transfer of the good will or substantially all of the assets of  
 390 a business or any sale or transfer of a controlling interest in a business, whether by sale,  
 391 exchange, redemption, merger, or otherwise.

392 (16) 'Seller' means any person or entity, including any successor-in-interest to such an  
 393 entity, that is:

394 (A) An owner of a controlling interest;

395 (B) An executive employee, officer, or manager of the business who receives, at a  
 396 minimum, consideration in connection with either the sale or the sale of a business  
 397 covenant that is worth the equivalent of such person's most recent annual base salary  
 398 or is in the form of a commitment of continued employment for a period of at least one  
 399 year; or

400 (C) An affiliate of a person or entity described in subparagraph (A) of this paragraph;  
 401 provided, however, that each sale of a business covenant shall be binding only on the  
 402 person or entity entering into such covenant, its successors-in-interest, and, if so  
 403 specified in the covenant, any entity that directly or indirectly through one or more  
 404 affiliates is controlled by or is under common control of such person or entity.

405 (17) 'Termination' means the termination of an employee's engagement with an  
 406 employer, whether with or without cause, upon the initiative of either party.

407 (18) 'Trade dress' means the distinctive packaging or design of a product that promotes  
 408 the product and distinguishes it from other products in the marketplace.

409 13-8-52.

410 (a) The provisions of this article shall be applicable only to contracts and agreements  
 411 between or among:

412 (1) Employers and employees, as such terms are defined in Code Section 13-8-51;

413 (2) Distributors and manufacturers;

414 (3) Lessors and lessees;

415 (4) Partnerships and partners;

416 (5) Franchisors and franchisees;

417 (6) Sellers and purchasers of a business or commercial enterprise; and

418 (7) Two or more employers.

419 (b) The provisions of this article shall not apply to any contract or agreement not described  
 420 in subsection (a) of this Code section.

421 13-8-53.

422 (a) Notwithstanding any other provision of this chapter, enforcement of contracts that  
423 restrict competition during or after the term of employment or the term of a commercial or  
424 business relationship, so long as such contracts are reasonable in time, area, and scope of  
425 prohibited activities, is permitted. No such contract shall be declared void and  
426 unenforceable because it designates particular competitors as an employer for whom an  
427 employee or other party may not work, either directly or indirectly, pursuant to the terms  
428 of a restrictive covenant for a limited period of time after the term of employment or the  
429 term of a commercial or business relationship as long as such restrictive covenant prohibits  
430 the employee from performing only those activities that are the same as or similar to those  
431 activities that the employee performed for the employer.

432 (b) Notwithstanding any other provision of this chapter, an employee may agree in writing  
433 for the benefit of an employer to refrain, for a stated period of time following termination,  
434 from soliciting, or attempting to solicit, directly or by assisting others, any business from  
435 any of such business customers, including actively seeking prospective customers, with  
436 whom the employee had material contact during his or her employment for purposes of  
437 providing products or services that are competitive with those provided by the employer's  
438 business. No express reference to geographic area or the types of products or services  
439 considered to be competitive shall be required in order for the restraint to be enforceable.  
440 Any reference to a prohibition against 'soliciting or attempting to solicit business from  
441 customers' or similar language shall be adequate for such purpose and narrowly construed  
442 to apply only to: (1) such of the business's customers, including actively sought prospective  
443 customers, with whom the employee had material contact; and (2) products and services  
444 that are competitive with those provided by the employer's business.

445 (c)(1) Activities, products, or services that are competitive with the activities, products,  
446 or services of an employer shall include activities, products, or services that are the same  
447 as or similar to the activities, products, or services of the employer. Whenever a  
448 description of activities, products, and services, or areas, is required by this Code section,  
449 any description that provides fair notice of the maximum reasonable scope of the restraint  
450 shall satisfy such requirement, even if the description is generalized or could possibly be  
451 stated more narrowly to exclude extraneous matters. In case of a postemployment  
452 covenant entered into prior to termination, any good faith estimate of the activities,  
453 products, and services, or areas, that may be applicable at the time of termination shall  
454 also satisfy such requirement, even if such estimate is capable of including or ultimately  
455 proves to include extraneous activities, products, and services, or areas. The  
456 postemployment covenant shall be construed ultimately to cover only so much of such

457 estimate as relates to the activities actually conducted, the products and services actually  
458 offered, or the areas actually involved within a stated period of time prior to termination.  
459 (2) Activities, products, or services shall be considered sufficiently described if a  
460 reference to the activities, products, or services is provided and qualified by the phrase  
461 'of the type conducted, authorized, offered, or provided within two years prior to  
462 termination' or similar language. The phrase 'the areas where the employee is working  
463 at the time of termination' or similar language shall be considered sufficient as a  
464 description of areas if the person or entity bound by the restraint can reasonably  
465 determine the maximum reasonable scope of the restraint at the time of termination.  
466 (d) Any restrictive covenant not in compliance with the provisions of this article is  
467 unlawful and is void and unenforceable; provided, however, that a court may modify a  
468 covenant that is otherwise void and unenforceable as long as the modification does not  
469 render the covenant more restrictive with regard to the employee than as originally drafted  
470 by the parties.  
471 (e) Nothing in this article shall be construed to limit the period of time for which a party  
472 may agree to maintain information as confidential or as a trade secret only so long as the  
473 information or material remains confidential or a trade secret, as applicable.

474 13-8-54.

475 (a) A court shall construe a restrictive covenant to comport with the reasonable intent and  
476 expectations of the parties to the covenant and in favor of providing reasonable protection  
477 to all legitimate business interests established by the person seeking enforcement.

478 (b) In any action concerning enforcement of a restrictive covenant, a court shall not  
479 enforce a restrictive covenant unless it is in compliance with the provisions of Code  
480 Section 13-8-53; provided, however, that if a court finds that a contractually specified  
481 restraint does not comply with the provisions of Code Section 13-8-53, then the court may  
482 modify the restraint provision and grant only the relief reasonably necessary to protect such  
483 interest or interests and to achieve the original intent of the contracting parties to the extent  
484 possible.

485 13-8-55.

486 The person seeking enforcement of a restrictive covenant shall plead and prove the  
487 existence of one or more legitimate business interests justifying the restrictive covenant.  
488 If a person seeking enforcement of the restrictive covenant establishes by prima-facie  
489 evidence that the restraint is in compliance with the provisions of Code Section 13-8-53,  
490 then any person opposing enforcement has the burden of establishing that the contractually

491 specified restraint does not comply with such requirements or that such covenant is  
492 unreasonable.

493 13-8-56.

494 In determining the reasonableness of a restrictive covenant that limits or restricts  
495 competition during the course of an employment or business relationship, the court shall  
496 make the following presumptions:

497 (1) A time period equal to or measured by duration of the parties' business or commercial  
498 relationship is reasonable;

499 (2) A geographic scope which includes the areas in which the employer does business  
500 at any time during the parties' commercial relationship, even if not known at the time of  
501 entry into the restrictive covenant, is reasonable provided that:

502 (A) The total distance encompassed by the provisions of the covenant also is  
503 reasonable;

504 (B) The agreement contains a list of particular competitors as prohibited employers for  
505 a limited period of time after the term of employment or a commercial or business  
506 relationship; or

507 (C) Both subparagraphs (A) and (B) of this paragraph;

508 (3) The scope of competition restricted is measured by the business of the employer or  
509 other person or entity in whose favor the restrictive covenant is given; provided, however,  
510 that a court shall not refuse to enforce the provisions of a restrictive covenant because the  
511 person seeking enforcement establishes evidence that a restrictive covenant has been  
512 violated but has not proven that the covenant has been violated as to the entire scope of  
513 the prohibited activities of the person seeking enforcement or as to the entire geographic  
514 scope of the covenant; and

515 (4) Any restriction that operates during the term of an employment agreement or  
516 relationship, agency agreement, independent contractor agreement, partnership  
517 agreement, franchise, distributorship agreement, license, shareholders' agreement, or  
518 other ongoing business agreement shall not be considered unreasonable because it lacks  
519 any specific limitation upon scope of activity, duration, or territory as long as it promotes  
520 or protects the purpose or subject matter of the agreement or relationship or deters any  
521 potential conflict of interest.

522 13-8-57.

523 (a) In determining the reasonableness in time of a restrictive covenant sought to be  
524 enforced after a term of employment, a court shall apply the rebuttable presumptions  
525 provided in this Code section.

526 (b) In the case of a restrictive covenant sought to be enforced against a former employee  
527 and not associated with the sale or ownership of all or a material part of:

528 (1) The assets of a business or professional practice;

529 (2) The shares of a corporation;

530 (3) A partnership interest;

531 (4) A limited liability company membership; or

532 (5) An equity interest or profit participation, of any other type, in a business or  
533 professional practice,

534 a court shall presume to be reasonable in time any restraint two years or less in duration  
535 and shall presume to be unreasonable in time any restraint more than two years in duration,  
536 measured from the date of the termination of the business relationship.

537 (c) In the case of a restrictive covenant sought to be enforced against a current or former  
538 distributor, dealer, franchisee, lessor of real or personal property, or licensee of a  
539 trademark, trade dress, or service mark and not associated with the sale of all or a part of:

540 (1) The assets of a business or professional practice;

541 (2) The shares of a corporation;

542 (3) A partnership interest;

543 (4) A limited liability company membership; or

544 (5) An equity interest or profit participation, of any other type, in a business or  
545 professional practice,

546 a court shall presume to be reasonable in time any restraint three years or less in duration  
547 and shall presume to be unreasonable in time any restraint more than three years in  
548 duration, measured from the date of termination of the business relationship.

549 (d) In the case of a restrictive covenant sought to be enforced against the owner or seller  
550 of all or a material part of:

551 (1) The assets of a business or professional practice;

552 (2) The shares of a corporation;

553 (3) A partnership interest;

554 (4) A limited liability company membership; or

555 (5) An equity interest or profit participation, of any other type, in a business or  
556 professional practice,

557 a court shall presume to be reasonable in time any restraint five years or less in duration  
558 and shall presume to be unreasonable in time any restraint more than five years in duration,  
559 measured from the date of termination or disposition of such interest.

560 13-8-58.

561 (a) A court shall not refuse to enforce a restrictive covenant on the ground that the person  
562 seeking enforcement is a third-party beneficiary of such contract or is an assignee or  
563 successor to a party to such contract.

564 (b) In determining the enforceability of a restrictive covenant, it is not a defense that the  
565 person seeking enforcement no longer continues in business in the scope of the prohibited  
566 activities that is the subject of the action to enforce the restrictive covenant if such  
567 discontinuance of business is the result of a violation of the restriction.

568 (c) A court shall enforce a restrictive covenant by any appropriate and effective remedy  
569 available at law or equity, including, but not limited to, temporary and permanent  
570 injunctions.

571 13-8-59.

572 Nothing in this article shall be construed or interpreted to allow or to make enforceable any  
573 restraint of trade or commerce that is otherwise illegal or unenforceable under the laws of  
574 the United States or under the Constitution of this state or of the United States."

575 **SECTION 4.**

576 This Act shall become effective on the day following the ratification at the time of the 2010  
577 general election of an amendment to the Constitution of Georgia providing for the  
578 enforcement of covenants in commercial contracts that limit competition and shall apply to  
579 contracts entered into prior to, on, and after such date. If such amendment is not so ratified,  
580 then this Act shall stand automatically repealed.

581 **SECTION 5.**

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