

House Bill 173 (COMMITTEE SUBSTITUTE)

By: Representatives Levitas of the 82nd, Coan of the 101st, Smith of the 131st, Parrish of the 156th, Bearden of the 68th, 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 **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 purposes
122 of this definition, 'the discharge of an employee without cause' does not include (i) a
123 termination of a partnership agreement, franchise, distributorship, or license agreement
124 or a sales agent, broker, representative, or supervisor agreement in accordance with the
125 terms of the agreement or upon the completion or expiration of the agreement, (ii) any
126 termination under retirement programs of the employer, (iii) any termination that
127 follows the employee's refusal to accept an offer of continued employment on terms and
128 conditions at least as favorable to the employee as those previously in effect, or (iv) any
129 termination under circumstances where the employee remains or becomes entitled to
130 receive earnings, commissions, or benefits that serve as compensation, at least in part,
131 for the employee's compliance with the post-termination covenants.

132 (2) An employee may agree in writing for the benefit of an employer to refrain, for a
133 stated period of time following termination, from conducting activity that is competitive

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

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

151 (A) such of the business's customers, including actively sought prospective customers,
152 with whom the employee had material contact; and (B) products and services that are
153 competitive with those provided by the employer's business.

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

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

166 (6) A duration of two years or less in the case of a restraint of the type described in
167 paragraph (2) of this subsection, and three years or less in the case of a restraint of the
168 type described in paragraphs (3) and (4) of this subsection shall be presumed to be
169 reasonable as the period of time stated for any post-employment covenant.

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

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

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

198 (f)(1) Whenever a person or entity desires to verify the terms of any partial restraint in
199 effect at any time, or to obtain a clarification of a restraint believed to be unclear, such
200 person or entity may, at its option, demand such verification or clarification by delivering
201 to the persons or entities that benefit from such restraint a written statement that contains:
202 (A) if verification is sought, a request for a copy of each partial restraint in effect between
203 the parties; or (B) if clarification is sought, a description of the clarification requested;
204 and (C) in all cases, the following statement: 'THIS DEMAND IS MADE PURSUANT
205 TO CODE SECTION 13-8-2.1(f)(2) OF THE OFFICIAL CODE OF GEORGIA
206 ANNOTATED AND REQUIRES A RESPONSE WITHIN 30 DAYS.'

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

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

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

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

244 to partial enforcement, whether or not it contains a severability or similar clause and
 245 regardless of whether the unlawful aspects of such restraint are facially severable from
 246 those found lawful.

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

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

264 **SECTION 3.**

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

266 "ARTICLE 4

267 13-8-50.

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

275 13-8-51.

276 As used in this article, the term:

277 (1) 'Affiliate' means:

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

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

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

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

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

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

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

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

296 (C) Having value to the employer;

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

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

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

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

310 (5) 'Employee' means:

311 (A) An executive employee;

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

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

319 (D) A franchisee, distributor, lessee, licensee, or party to a partnership agreement or
 320 a sales agent, broker, or representative in connection with franchise, distributorship,
 321 lease, license, or partnership agreements.

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

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

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

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

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

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

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

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

- 349 (D) Customer, patient, or client good will associated with:
- 350 (i) An ongoing business, commercial, or professional practice, including, but not
- 351 limited to, by way of trade name, trademark, service mark, or trade dress;
- 352 (ii) A specific geographic location; or
- 353 (iii) A specific marketing or trade area; and
- 354 (E) Extraordinary or specialized training.
- 355 (10) 'Material contact' means the contact between an employee and each customer or
- 356 potential customer:
- 357 (A) With whom or which the employee dealt on behalf of the employer;
- 358 (B) Whose dealings with the employer were coordinated or supervised by the
- 359 employee;
- 360 (C) About whom the employee obtained confidential information in the ordinary
- 361 course of business as a result of such employee's association with the employer; or
- 362 (D) Who receives products or services authorized by the employer, the sale or
- 363 provision of which results or resulted in compensation, commissions, or earnings for
- 364 the employee within two years prior to the date of the employee's termination.
- 365 (11) 'Modification' means the limitation of a restrictive covenant to render it reasonable
- 366 in light of the circumstances in which it was made. Such term shall include:
- 367 (A) Severing or removing that part of a restrictive covenant that would otherwise make
- 368 the entire restrictive covenant unenforceable; and
- 369 (B) Enforcing the provisions of a restrictive covenant to the extent that the provisions
- 370 are reasonable.
- 371 (12) 'Modify' means to make, to cause, or otherwise to bring about a modification.
- 372 (13) 'Products or services' means anything of commercial value, including, without
- 373 limitation, goods; personal, real, or intangible property; services; financial products;
- 374 business opportunities or assistance; or any other object or aspect of business or the
- 375 conduct thereof.
- 376 (14) 'Professional' means an employee who has as a primary duty the performance of
- 377 work requiring knowledge of an advanced type in a field of science or learning
- 378 customarily acquired by a prolonged course of specialized intellectual instruction or
- 379 requiring invention, imagination, originality, or talent in a recognized field of artistic or
- 380 creative endeavor. Such term shall not include employees performing technician work
- 381 using knowledge acquired through on-the-job and classroom training, rather than by
- 382 acquiring the knowledge through prolonged academic study, such as might be performed,
- 383 without limitation, by a mechanic, a manual laborer, or a ministerial employee.
- 384 (15) 'Restrictive covenant' means an agreement between two or more parties that exists
- 385 to protect the first party's or parties' interest in property, confidential information,

386 customer good will, business relationships, employees, or any other economic advantages
 387 that the second party has obtained for the benefit of the first party or parties, to which the
 388 second party has gained access in the course of his or her relationship with the first party
 389 or parties, or which the first party or parties has acquired from the second party or parties
 390 as the result of a sale. Such restrictive covenants may exist within or ancillary to
 391 contracts between or among employers and employees, distributors and manufacturers,
 392 lessors and lessees, partnerships and partners, employers and independent contractors,
 393 franchisors and franchisees, and sellers and purchasers of a business or commercial
 394 enterprise and any two or more employers. A restrictive covenant shall not include
 395 covenants appurtenant to real property.

396 (16) 'Sale' means any sale or transfer of the good will or substantially all of the assets of
 397 a business or any sale or transfer of a controlling interest in a business, whether by sale,
 398 exchange, redemption, merger, or otherwise.

399 (17) 'Seller' means any person or entity, including any successor-in-interest to such an
 400 entity, that is:

401 (A) An owner of a controlling interest;

402 (B) An executive employee of the business who receives, at a minimum, consideration
 403 in connection with a sale; or

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

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

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

413 13-8-52.

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

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

417 (2) Distributors and manufacturers;

418 (3) Lessors and lessees;

419 (4) Partnerships and partners;

420 (5) Franchisors and franchisees;

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

422 (7) Two or more employers.

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

425 13-8-53.

426 (a) Notwithstanding any other provision of this chapter, enforcement of contracts that
427 restrict competition during the term of a restrictive covenant, so long as such restrictions
428 are reasonable in time, geographic area, and scope of prohibited activities, shall be
429 permitted. However, enforcement of contracts that restrict competition after the term of
430 employment, as distinguished from a customer nonsolicitation provision, as described in
431 subsection (b) of Code Section 13-8-53, or a nondisclosure of confidential information
432 provision, as described in subsection (e) of Code Section 13-8-53, shall not be permitted
433 against any employee who does not, in the course of his or her employment:

434 (1) Customarily and regularly solicit for the employer customers or prospective
435 customers;

436 (2) Customarily and regularly engage in making sales or obtaining orders or contracts
437 for products or services to be performed by others;

438 (3) Perform the following duties:

439 (A) Have a primary duty of managing the enterprise in which the employee is
440 employed or of a customarily recognized department or subdivision thereof;

441 (B) Customarily and regularly direct the work of two or more other employees; and

442 (C) Have the authority to hire or fire other employees or have particular weight given
443 to suggestions and recommendations as to the hiring, firing, advancement, promotion,
444 or any other change of status of other employees; or

445 (4) Perform the duties of a key employee or of a professional.

446 (b) Notwithstanding any other provision of this chapter, an employee may agree in writing
447 for the benefit of an employer to refrain, for a stated period of time following termination,
448 from soliciting, or attempting to solicit, directly or by assisting others, any business from
449 any of such employer's customers, including actively seeking prospective customers, with
450 whom the employee had material contact during his or her employment for purposes of
451 providing products or services that are competitive with those provided by the employer's
452 business. No express reference to geographic area or the types of products or services
453 considered to be competitive shall be required in order for the restraint to be enforceable.
454 Any reference to a prohibition against 'soliciting or attempting to solicit business from
455 customers' or similar language shall be adequate for such purpose and narrowly construed
456 to apply only to: (1) such of the employer's customers, including actively sought

457 prospective customers, with whom the employee had material contact; and (2) products and
458 services that are competitive with those provided by the employer's business.

459 (c)(1) Activities, products, or services that are competitive with the activities, products,
460 or services of an employer shall include activities, products, or services that are the same
461 as or similar to the activities, products, or services of the employer. Whenever a
462 description of activities, products, and services, or geographic areas, is required by this
463 Code section, any description that provides fair notice of the maximum reasonable scope
464 of the restraint shall satisfy such requirement, even if the description is generalized or
465 could possibly be stated more narrowly to exclude extraneous matters. In case of a
466 postemployment covenant entered into prior to termination, any good faith estimate of
467 the activities, products, and services, or geographic areas, that may be applicable at the
468 time of termination shall also satisfy such requirement, even if such estimate is capable
469 of including or ultimately proves to include extraneous activities, products, and services,
470 or geographic areas. The postemployment covenant shall be construed ultimately to
471 cover only so much of such estimate as relates to the activities actually conducted, the
472 products and services actually offered, or the geographic areas actually involved within
473 a reasonable period of time prior to termination.

474 (2) Activities, products, or services shall be considered sufficiently described if a
475 reference to the activities, products, or services is provided and qualified by the phrase
476 'of the type conducted, authorized, offered, or provided within two years prior to
477 termination' or similar language containing the same or a lesser time period. The phrase
478 'the territory where the employee is working at the time of termination' or similar
479 language shall be considered sufficient as a description of geographic areas if the person
480 or entity bound by the restraint can reasonably determine the maximum reasonable scope
481 of the restraint at the time of termination.

482 (d) Any restrictive covenant not in compliance with the provisions of this article is
483 unlawful and is void and unenforceable; provided, however, that a court may modify a
484 covenant that is otherwise void and unenforceable as long as the modification does not
485 render the covenant more restrictive with regard to the employee than as originally drafted
486 by the parties.

487 (e) Nothing in this article shall be construed to limit the period of time for which a party
488 may agree to maintain information as confidential or as a trade secret, or to limit the
489 geographic area within which such information must be kept confidential or as a trade
490 secret, for so long as the information or material remains confidential or a trade secret, as
491 applicable.

492 13-8-54.

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

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

503 13-8-55.

504 The person seeking enforcement of a restrictive covenant shall plead and prove the
505 existence of one or more legitimate business interests justifying the restrictive covenant.

506 If a person seeking enforcement of the restrictive covenant establishes by prima-facie
507 evidence that the restraint is in compliance with the provisions of Code Section 13-8-53,
508 then any person opposing enforcement has the burden of establishing that the contractually
509 specified restraint does not comply with such requirements or that such covenant is
510 unreasonable.

511 13-8-56.

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

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

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

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

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

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

526 (3) The scope of competition restricted is measured by the business of the employer or
 527 other person or entity in whose favor the restrictive covenant is given; provided, however,
 528 that a court shall not refuse to enforce the provisions of a restrictive covenant because the
 529 person seeking enforcement establishes evidence that a restrictive covenant has been
 530 violated but has not proven that the covenant has been violated as to the entire scope of
 531 the prohibited activities of the person seeking enforcement or as to the entire geographic
 532 area of the covenant; and

533 (4) Any restriction that operates during the term of an employment relationship, agency
 534 relationship, independent contractor relationship, partnership, franchise, distributorship,
 535 license, ownership of a stake in a business entity, or other ongoing business relationship
 536 shall not be considered unreasonable because it lacks any specific limitation upon scope
 537 of activity, duration, or geographic area as long as it promotes or protects the purpose or
 538 subject matter of the agreement or relationship or deters any potential conflict of interest.

539 13-8-57.

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

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

545 (1) The assets of a business, professional practice, or other commercial enterprise;

546 (2) The shares of a corporation;

547 (3) A partnership interest;

548 (4) A limited liability company membership; or

549 (5) An equity interest or profit participation, of any other type, in a business, professional
 550 practice, or other commercial enterprise,

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

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

557 (1) The assets of a business, professional practice, or other commercial enterprise;

558 (2) The shares of a corporation;

559 (3) A partnership interest;

560 (4) A limited liability company membership; or

561 (5) An equity interest or profit participation, of any other type, in a business, professional
 562 practice, or other commercial enterprise,

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

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

568 (1) The assets of a business, professional practice, or other commercial enterprise;

569 (2) The shares of a corporation;

570 (3) A partnership interest;

571 (4) A limited liability company membership; or

572 (5) An equity interest or profit participation, of any other type, in a business, professional
 573 practice, or other commercial enterprise,

574 a court shall presume to be reasonable in time any restraint the longer of five years or less
 575 in duration or equal to the period of time during which payments are being made to the
 576 owner or seller as a result of any sale referred to in this subsection and shall presume to be
 577 unreasonable in time any restraint more than the longer of five years in duration or the
 578 period of time during which payments are being made to the owner or seller as a result of
 579 any sale referred to in this subsection, measured from the date of termination or disposition
 580 of such interest.

581 13-8-58.

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

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

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

592 (d) In determining the reasonableness of a restrictive covenant between an employer and
 593 an employee, as such terms are defined in subparagraphs (A) through (C) of paragraph (5)
 594 of Code Section 13-8-51, a court may consider the economic hardship imposed upon an
 595 employee by enforcement of the covenant; provided, however, that this subsection shall not

596 apply to contracts or agreements between or among those persons or entities listed in
597 paragraphs (2) through (7) of subsection (a) of Code Section 13-8-52.

598 13-8-59.

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

602 **SECTION 4.**

603 This Act shall become effective on the day following the ratification at the time of the 2010
604 general election of an amendment to the Constitution of Georgia providing for the
605 enforcement of covenants in commercial contracts that limit competition and shall apply to
606 contracts entered into on and after such date and shall not apply in actions determining the
607 enforceability of restrictive covenants entered into before such date. If such amendment is
608 not so ratified, then this Act shall stand automatically repealed.

609 **SECTION 5.**

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