

A BILL TO BE ENTITLED
AN ACT

1 To provide for legislative findings; to amend Chapter 8 of Title 13 of the Official Code of
2 Georgia Annotated, relating to illegal or void contracts generally, so as to repeal Code
3 Section 13-8-2.1, relating to contracts in partial restraint of trade; to change provisions
4 relating to contracts contravening public policy; to repeal Article 4 of Chapter 8 of Title 13,
5 relating to restrictive covenants in contracts; to provide a statement of legislative findings;
6 to define certain terms; to provide for applicability; to provide for the enforcement of
7 contracts that restrict or prohibit competition in certain commercial agreements; to provide
8 for the judicial enforcement of such provisions; to provide for the modification of such
9 provisions; to provide for rebuttable presumptions; to provide for enforcement by
10 third-parties; to provide for construction; to provide for related matters; to provide for an
11 effective date and applicability; to repeal conflicting laws; and for other purposes.

12 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

13
14 During the 2009 legislative session the General Assembly enacted HB 173 (Act No. 64, Ga.
15 L. 2009, p. 231), which was a bill that dealt with the issue of restrictive covenants in
16 contracts and which was contingently effective on the passage of a constitutional
17 amendment. During the 2010 legislative session the General Assembly enacted HR 178 (Ga.
18 L. 2010, p. 1260), the constitutional amendment necessary for the statutory language of HB
19 173 (Act No. 64, Ga. L. 2009, p. 231), and the voters ratified the constitutional amendment
20 on November 2, 2010. It has been suggested by certain parties that because of the effective
21 date provisions of HB 173 (Act No. 64, Ga. L. 2009, p. 231), there may be some question
22 about the validity of that legislation. It is the intention of this Act to remove any such
23 uncertainty by substantially reenacting the substantive provisions of HB 173 (Act No. 64, Ga.
24 L. 2009, p. 231), but the enactment of this Act should not be taken as evidence of a
25 legislative determination that HB 173 (Act No. 64, Ga. L. 2009, p. 231) was in fact invalid.

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SECTION 2.

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

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

- (1) Contracts tending to corrupt legislation or the judiciary;
- (2) Contracts in general restraint of trade, as distinguished from contracts which restrict certain competitive activities, as provided in Article 4 of this chapter;
- (3) Contracts to evade or oppose the revenue laws of another country;
- (4) Wagering contracts; or
- (5) Contracts of maintenance or champerty."

SECTION 3.

Said chapter is further amended by repealing Code Section 13-8-2.1, relating to contracts in partial restraint of trade.

SECTION 4.

Said chapter is further amended by repealing Article 4, relating to restrictive covenants in contracts, and enacting a new Article 4 to read as follows:

"ARTICLE 4

13-8-50.

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

13-8-51.

As used in this article, the term:

- (1) 'Affiliate' means:
 - (A) A person or entity that directly, or indirectly through one or more intermediaries, controls or is controlled by or is under common control with another person or entity;

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

61 (C) Any trust or other estate in which the person or entity has a beneficial interest of
62 25 percent or more or as to which such person or entity serves as trustee or in a similar
63 fiduciary capacity; or

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

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

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

69 (A) Relating to the business of the employer, regardless of whether the data or
70 information constitutes a trade secret as that term is defined in Code Section 10-1-761;

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

73 (C) Having value to the employer;

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

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

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

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

87 (5) 'Employee' means:

88 (A) An executive employee;

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

92 (C) Any other person or entity, including an independent contractor, in possession of
93 selective or specialized skills, learning, or abilities or customer contacts, customer

94 information, or confidential information who or that has obtained such skills, learning,
95 abilities, contacts, or information by reason of having worked for an employer; or
96 (D) A franchisee, distributor, lessee, licensee, or party to a partnership agreement or
97 a sales agent, broker, or representative in connection with franchise, distributorship,
98 lease, license, or partnership agreements.

99 Such term shall not include any employee who lacks selective or specialized skills,
100 learning, or abilities or customer contacts, customer information, or confidential
101 information.

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

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

110 (8) 'Key employee' means an employee who, by reason of the employer's investment of
111 time, training, money, trust, exposure to the public, or exposure to customers, vendors,
112 or other business relationships during the course of the employee's employment with the
113 employer, has gained a high level of notoriety, fame, reputation, or public persona as the
114 employer's representative or spokesperson or has gained a high level of influence or
115 credibility with the employer's customers, vendors, or other business relationships or is
116 intimately involved in the planning for or direction of the business of the employer or a
117 defined unit of the business of the employer. Such term also means an employee in
118 possession of selective or specialized skills, learning, or abilities or customer contacts or
119 customer information who has obtained such skills, learning, abilities, contacts, or
120 information by reason of having worked for the employer.

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

122 (A) Trade secrets, as defined by Code Section 10-1-761;

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

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

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

127 (i) An ongoing business, commercial, or professional practice, including, but not
128 limited to, by way of trade name, trademark, service mark, or trade dress;

129 (ii) A specific geographic location; or

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

- 131 (E) Extraordinary or specialized training.
- 132 (10) 'Material contact' means the contact between an employee and each customer or
133 potential customer:
- 134 (A) With whom or which the employee dealt on behalf of the employer;
135 (B) Whose dealings with the employer were coordinated or supervised by the
136 employee;
- 137 (C) About whom the employee obtained confidential information in the ordinary
138 course of business as a result of such employee's association with the employer; or
139 (D) Who receives products or services authorized by the employer, the sale or
140 provision of which results or resulted in compensation, commissions, or earnings for
141 the employee within two years prior to the date of the employee's termination.
- 142 (11) 'Modification' means the limitation of a restrictive covenant to render it reasonable
143 in light of the circumstances in which it was made. Such term shall include:
- 144 (A) Severing or removing that part of a restrictive covenant that would otherwise make
145 the entire restrictive covenant unenforceable; and
146 (B) Enforcing the provisions of a restrictive covenant to the extent that the provisions
147 are reasonable.
- 148 (12) 'Modify' means to make, to cause, or otherwise to bring about a modification.
- 149 (13) 'Products or services' means anything of commercial value, including, without
150 limitation, goods; personal, real, or intangible property; services; financial products;
151 business opportunities or assistance; or any other object or aspect of business or the
152 conduct thereof.
- 153 (14) 'Professional' means an employee who has as a primary duty the performance of
154 work requiring knowledge of an advanced type in a field of science or learning
155 customarily acquired by a prolonged course of specialized intellectual instruction or
156 requiring invention, imagination, originality, or talent in a recognized field of artistic or
157 creative endeavor. Such term shall not include employees performing technician work
158 using knowledge acquired through on-the-job and classroom training, rather than by
159 acquiring the knowledge through prolonged academic study, such as might be performed,
160 without limitation, by a mechanic, a manual laborer, or a ministerial employee.
- 161 (15) 'Restrictive covenant' means an agreement between two or more parties that exists
162 to protect the first party's or parties' interest in property, confidential information,
163 customer good will, business relationships, employees, or any other economic advantages
164 that the second party has obtained for the benefit of the first party or parties, to which the
165 second party has gained access in the course of his or her relationship with the first party
166 or parties, or which the first party or parties has acquired from the second party as the
167 result of a sale. Such restrictive covenants may exist within or ancillary to contracts

168 between or among employers and employees, distributors and manufacturers, lessors and
 169 lessees, partnerships and partners, employers and independent contractors, franchisors
 170 and franchisees, and sellers and purchasers of a business or commercial enterprise and
 171 any two or more employers. A restrictive covenant shall not include covenants
 172 appurtenant to real property.

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

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

178 (A) An owner of a controlling interest;

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

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

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

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

190 13-8-52.

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

193 (1) Employers and employees;

194 (2) Distributors and manufacturers;

195 (3) Lessors and lessees;

196 (4) Partnerships and partners;

197 (5) Franchisors and franchisees;

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

199 (7) Two or more employers.

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

202 13-8-53.

203 (a) Notwithstanding any other provision of this chapter, enforcement of contracts that
 204 restrict competition during the term of a restrictive covenant, so long as such restrictions
 205 are reasonable in time, geographic area, and scope of prohibited activities, shall be
 206 permitted. However, enforcement of contracts that restrict competition after the term of
 207 employment, as distinguished from a customer nonsolicitation provision, as described in
 208 subsection (b) of this Code section, or a nondisclosure of confidential information
 209 provision, as described in subsection (e) of this Code section, shall not be permitted against
 210 any employee who does not, in the course of his or her employment:

211 (1) Customarily and regularly solicit for the employer customers or prospective
 212 customers;

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

215 (3) Perform the following duties:

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

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

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

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

223 (b) Notwithstanding any other provision of this chapter, an employee may agree in writing
 224 for the benefit of an employer to refrain, for a stated period of time following termination,
 225 from soliciting, or attempting to solicit, directly or by assisting others, any business from
 226 any of such employer's customers, including actively seeking prospective customers, with
 227 whom the employee had material contact during his or her employment for purposes of
 228 providing products or services that are competitive with those provided by the employer's
 229 business. No express reference to geographic area or the types of products or services
 230 considered to be competitive shall be required in order for the restraint to be enforceable.
 231 Any reference to a prohibition against 'soliciting or attempting to solicit business from
 232 customers' or similar language shall be adequate for such purpose and narrowly construed
 233 to apply only to: (1) such of the employer's customers, including actively sought
 234 prospective customers, with whom the employee had material contact; and (2) products or
 235 services that are competitive with those provided by the employer's business.

236 (c)(1) Activities, products, or services that are competitive with the activities, products,
 237 or services of an employer shall include activities, products, or services that are the same
 238 as or similar to the activities, products, or services of the employer. Whenever a

239 description of activities, products, or services, or geographic areas, is required by this
240 Code section, any description that provides fair notice of the maximum reasonable scope
241 of the restraint shall satisfy such requirement, even if the description is generalized or
242 could possibly be stated more narrowly to exclude extraneous matters. In case of a
243 postemployment covenant entered into prior to termination, any good faith estimate of
244 the activities, products, or services, or geographic areas, that may be applicable at the
245 time of termination shall also satisfy such requirement, even if such estimate is capable
246 of including or ultimately proves to include extraneous activities, products, or services,
247 or geographic areas. The postemployment covenant shall be construed ultimately to
248 cover only so much of such estimate as relates to the activities actually conducted, the
249 products or services actually offered, or the geographic areas actually involved within a
250 reasonable period of time prior to termination.

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

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

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

269 13-8-54.

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

273 (b) In any action concerning enforcement of a restrictive covenant, a court shall not
274 enforce a restrictive covenant unless it is in compliance with the provisions of Code

275 Section 13-8-53; provided, however, that if a court finds that a contractually specified
276 restraint does not comply with the provisions of Code Section 13-8-53, then the court may
277 modify the restraint provision and grant only the relief reasonably necessary to protect such
278 interest or interests and to achieve the original intent of the contracting parties to the extent
279 possible.

280 13-8-55.

281 The person seeking enforcement of a restrictive covenant shall plead and prove the
282 existence of one or more legitimate business interests justifying the restrictive covenant.
283 If a person seeking enforcement of the restrictive covenant establishes by prima-facie
284 evidence that the restraint is in compliance with the provisions of Code Section 13-8-53,
285 then any person opposing enforcement has the burden of establishing that the contractually
286 specified restraint does not comply with such requirements or that such covenant is
287 unreasonable.

288 13-8-56.

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

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

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

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

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

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

303 (3) The scope of competition restricted is measured by the business of the employer or
304 other person or entity in whose favor the restrictive covenant is given; provided, however,
305 that a court shall not refuse to enforce the provisions of a restrictive covenant because the
306 person seeking enforcement establishes evidence that a restrictive covenant has been
307 violated but has not proven that the covenant has been violated as to the entire scope of
308 the prohibited activities of the person seeking enforcement or as to the entire geographic
309 area of the covenant; and

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

316 13-8-57.

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

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

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

323 (2) The shares of a corporation;

324 (3) A partnership interest;

325 (4) A limited liability company membership; or

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

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

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

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

335 (2) The shares of a corporation;

336 (3) A partnership interest;

337 (4) A limited liability company membership; or

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

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

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

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

- 346 (2) The shares of a corporation;
 347 (3) A partnership interest;
 348 (4) A limited liability company membership; or
 349 (5) An equity interest or profit participation, of any other type, in a business, professional
 350 practice, or other commercial enterprise.

351 a court shall presume to be reasonable in time any restraint the longer of five years or less
 352 in duration or equal to the period of time during which payments are being made to the
 353 owner or seller as a result of any sale referred to in this subsection and shall presume to be
 354 unreasonable in time any restraint more than the longer of five years in duration or the
 355 period of time during which payments are being made to the owner or seller as a result of
 356 any sale referred to in this subsection, measured from the date of termination or disposition
 357 of such interest.

358 13-8-58.

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

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

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

369 (d) In determining the reasonableness of a restrictive covenant between an employer and
 370 an employee, as such term is defined in subparagraphs (A) through (C) of paragraph (5) of
 371 Code Section 13-8-51, a court may consider the economic hardship imposed upon an
 372 employee by enforcement of the covenant; provided, however, that this subsection shall not
 373 apply to contracts or agreements between or among those persons or entities listed in
 374 paragraphs (2) through (7) of subsection (a) of Code Section 13-8-52.

375 13-8-59.

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

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SECTION 5.

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This Act shall become effective upon its approval by the Governor or upon its becoming law

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without such approval and shall apply to contracts entered into on and after such date and

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shall not apply in actions determining the enforceability of restrictive covenants entered into

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before such date.

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SECTION 6.

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