

The Senate Judiciary Committee offered the following substitute to HB 30:

A BILL TO BE ENTITLED
AN ACT

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

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

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

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;

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

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

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

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

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

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

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

(C) Having value to the employer;

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

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

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

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

(5) 'Employee' means:

(A) An executive employee;

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) A specific geographic location; or

(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

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

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

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

(A) An owner of a controlling interest;

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

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

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

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

13-8-52.

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

(1) Employers and employees;

(2) Distributors and manufacturers;

(3) Lessors and lessees;

(4) Partnerships and partners;

(5) Franchisors and franchisees;

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

(7) Two or more employers.

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

13-8-53.

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

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

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

(3) Perform the following duties:

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

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

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

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

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

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

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

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

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

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

13-8-54.

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

(b) In any action concerning enforcement of a restrictive covenant, a court shall not 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 or after the term of an employment or business or commercial
291 relationship, the court shall make the following presumptions:

292 (1) During the term of the relationship, a time period equal to or measured by duration
293 of the parties' relationship is reasonable; provided, however, that the reasonableness of
294 a time period after the term of an employment or business or commercial relationship
295 shall be as provided for in Code Section 13-8-57;

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

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

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

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

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

the prohibited activities of the person seeking enforcement or as to the entire geographic area of the covenant; and

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

13-8-57.

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

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

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

(2) The shares of a corporation;

(3) A partnership interest;

(4) A limited liability company membership; or

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

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

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

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

(2) The shares of a corporation;

(3) A partnership interest;

(4) A limited liability company membership; or

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

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

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

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

(2) The shares of a corporation;

(3) A partnership interest;

(4) A limited liability company membership; or

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

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

13-8-58.

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

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

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

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

377 13-8-59.
378 Nothing in this article shall be construed or interpreted to allow or to make enforceable any
379 restraint of trade or commerce that is otherwise illegal or unenforceable under the laws of
380 the United States or under the Constitution of this state or of the United States."

381 **SECTION 5.**

382 This Act shall become effective upon its approval by the Governor or upon its becoming law
383 without such approval and shall apply to contracts entered into on and after such date and
384 shall not apply in actions determining the enforceability of restrictive covenants entered into
385 before such date.

386 **SECTION 6.**

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