

SENATE SUBSTITUTE TO HB 30

AS PASSED SENATE

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 amend Title 50 of the Official Code of Georgia
 11 Annotated, relating to state government, so as to provide that no contract between the
 12 Governor and any Indian tribe shall be signed without the consent of the General Assembly;
 13 to provide for related matters; to provide for an effective date and applicability; to repeal
 14 conflicting laws; and for other purposes.

15 **BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:**

PART I

SECTION 1-1.

16
 17
 18 During the 2009 legislative session the General Assembly enacted HB 173 (Act No. 64,
 19 Ga. L. 2009, p. 231), which was a bill that dealt with the issue of restrictive covenants in
 20 contracts and which was contingently effective on the passage of a constitutional
 21 amendment. During the 2010 legislative session the General Assembly enacted HR 178
 22 (Ga. L. 2010, p. 1260), the constitutional amendment necessary for the statutory language
 23 of HB 173 (Act No. 64, Ga. L. 2009, p. 231), and the voters ratified the constitutional
 24 amendment on November 2, 2010. It has been suggested by certain parties that because
 25 of the effective date provisions of HB 173 (Act No. 64, Ga. L. 2009, p. 231), there may
 26 be some question about the validity of that legislation. It is the intention of this Act to

27 remove any such uncertainty by substantially reenacting the substantive provisions of HB
 28 173 (Act No. 64, Ga. L. 2009, p. 231), but the enactment of this Act should not be taken
 29 as evidence of a legislative determination that HB 173 (Act No. 64, Ga. L. 2009, p. 231)
 30 was in fact invalid.

31 **SECTION 1-2.**

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

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

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

44 **SECTION 1-3.**

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

47 **SECTION 1-4.**

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

50 "ARTICLE 4

51 13-8-50.

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

59 13-8-51.

60 As used in this article, the term:

61 (1) 'Affiliate' means:

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

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

68 (C) Any trust or other estate in which the person or entity has a beneficial interest of
69 25 percent or more or as to which such person or entity serves as trustee or in a
70 similar fiduciary capacity; or

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

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

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

76 (A) Relating to the business of the employer, regardless of whether the data or
77 information constitutes a trade secret as that term is defined in Code Section
78 10-1-761;

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

81 (C) Having value to the employer;

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

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

86 provided, however, that such term shall not mean data or information (A) which has
87 been voluntarily disclosed to the public by the employer, except where such public
88 disclosure has been made by the employee without authorization from the employer;

89 (B) which has been independently developed and disclosed by others; or (C) which
90 has otherwise entered the public domain through lawful means.

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

96 (5) 'Employee' means:

97 (A) An executive employee;

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

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

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

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

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

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

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

- 133 (9) 'Legitimate business interest' includes, but is not limited to:
134 (A) Trade secrets, as defined by Code Section 10-1-761;
135 (B) Valuable confidential information that otherwise does not qualify as a trade
136 secret;
137 (C) Substantial relationships with specific prospective or existing customers,
138 patients, vendors, or clients;
139 (D) Customer, patient, or client good will associated with:
140 (i) An ongoing business, commercial, or professional practice, including, but not
141 limited to, by way of trade name, trademark, service mark, or trade dress;
142 (ii) A specific geographic location; or
143 (iii) A specific marketing or trade area; and
144 (E) Extraordinary or specialized training.
- 145 (10) 'Material contact' means the contact between an employee and each customer or
146 potential customer:
147 (A) With whom or which the employee dealt on behalf of the employer;
148 (B) Whose dealings with the employer were coordinated or supervised by the
149 employee;
150 (C) About whom the employee obtained confidential information in the ordinary
151 course of business as a result of such employee's association with the employer; or
152 (D) Who receives products or services authorized by the employer, the sale or
153 provision of which results or resulted in compensation, commissions, or earnings for
154 the employee within two years prior to the date of the employee's termination.
- 155 (11) 'Modification' means the limitation of a restrictive covenant to render it
156 reasonable in light of the circumstances in which it was made. Such term shall
157 include:
158 (A) Severing or removing that part of a restrictive covenant that would otherwise
159 make the entire restrictive covenant unenforceable; and
160 (B) Enforcing the provisions of a restrictive covenant to the extent that the
161 provisions are reasonable.
- 162 (12) 'Modify' means to make, to cause, or otherwise to bring about a modification.
163 (13) 'Products or services' means anything of commercial value, including, without
164 limitation, goods; personal, real, or intangible property; services; financial products;
165 business opportunities or assistance; or any other object or aspect of business or the
166 conduct thereof.
- 167 (14) 'Professional' means an employee who has as a primary duty the performance of
168 work requiring knowledge of an advanced type in a field of science or learning
169 customarily acquired by a prolonged course of specialized intellectual instruction or

170 requiring invention, imagination, originality, or talent in a recognized field of artistic
 171 or creative endeavor. Such term shall not include employees performing technician
 172 work using knowledge acquired through on-the-job and classroom training, rather
 173 than by acquiring the knowledge through prolonged academic study, such as might be
 174 performed, without limitation, by a mechanic, a manual laborer, or a ministerial
 175 employee.

176 (15) 'Restrictive covenant' means an agreement between two or more parties that
 177 exists to protect the first party's or parties' interest in property, confidential
 178 information, customer good will, business relationships, employees, or any other
 179 economic advantages that the second party has obtained for the benefit of the first
 180 party or parties, to which the second party has gained access in the course of his or her
 181 relationship with the first party or parties, or which the first party or parties has
 182 acquired from the second party as the result of a sale. Such restrictive covenants may
 183 exist within or ancillary to contracts between or among employers and employees,
 184 distributors and manufacturers, lessors and lessees, partnerships and partners,
 185 employers and independent contractors, franchisors and franchisees, and sellers and
 186 purchasers of a business or commercial enterprise and any two or more employers. A
 187 restrictive covenant shall not include covenants appurtenant to real property.

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

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

193 (A) An owner of a controlling interest;

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

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

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

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

206 13-8-52.

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

209 (1) Employers and employees;

210 (2) Distributors and manufacturers;

211 (3) Lessors and lessees;

212 (4) Partnerships and partners;

213 (5) Franchisors and franchisees;

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

215 (7) Two or more employers.

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

218 13-8-53.

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

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

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

231 (3) Perform the following duties:

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

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

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

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

239 (b) Notwithstanding any other provision of this chapter, an employee may agree in
 240 writing for the benefit of an employer to refrain, for a stated period of time following
 241 termination, from soliciting, or attempting to solicit, directly or by assisting others, any

242 business from any of such employer's customers, including actively seeking prospective
243 customers, with whom the employee had material contact during his or her employment
244 for purposes of providing products or services that are competitive with those provided
245 by the employer's business. No express reference to geographic area or the types of
246 products or services considered to be competitive shall be required in order for the
247 restraint to be enforceable. Any reference to a prohibition against 'soliciting or
248 attempting to solicit business from customers' or similar language shall be adequate for
249 such purpose and narrowly construed to apply only to: (1) such of the employer's
250 customers, including actively sought prospective customers, with whom the employee
251 had material contact; and (2) products or services that are competitive with those
252 provided by the employer's business.

253 (c)(1) Activities, products, or services that are competitive with the activities,
254 products, or services of an employer shall include activities, products, or services that
255 are the same as or similar to the activities, products, or services of the employer.
256 Whenever a description of activities, products, or services, or geographic areas, is
257 required by this Code section, any description that provides fair notice of the
258 maximum reasonable scope of the restraint shall satisfy such requirement, even if the
259 description is generalized or could possibly be stated more narrowly to exclude
260 extraneous matters. In case of a postemployment covenant entered into prior to
261 termination, any good faith estimate of the activities, products, or services, or
262 geographic areas, that may be applicable at the time of termination shall also satisfy
263 such requirement, even if such estimate is capable of including or ultimately proves to
264 include extraneous activities, products, or services, or geographic areas. The
265 postemployment covenant shall be construed ultimately to cover only so much of such
266 estimate as relates to the activities actually conducted, the products or services
267 actually offered, or the geographic areas actually involved within a reasonable period
268 of time prior to termination.

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

277 (d) Any restrictive covenant not in compliance with the provisions of this article is
278 unlawful and is void and unenforceable; provided, however, that a court may modify a

279 covenant that is otherwise void and unenforceable so long as the modification does not
280 render the covenant more restrictive with regard to the employee than as originally
281 drafted by the parties.

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

287 13-8-54.

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

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

299 13-8-55.

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

307 13-8-56.

308 In determining the reasonableness of a restrictive covenant that limits or restricts
309 competition during or after the term of an employment or business or commercial
310 relationship, the court shall make the following presumptions:

311 (1) During the term of the relationship, a time period equal to or measured by
312 duration of the parties' relationship is reasonable; provided, however, that the

- 313 reasonableness of a time period after the term of an employment or business or
 314 commercial relationship shall be as provided for in Code Section 13-8-57;
 315 (2) A geographic territory which includes the areas in which the employer does
 316 business at any time during the parties' relationship, even if not known at the time of
 317 entry into the restrictive covenant, is reasonable provided that:
 318 (A) The total distance encompassed by the provisions of the covenant also is
 319 reasonable;
 320 (B) The agreement contains a list of particular competitors as prohibited employers
 321 for a limited period of time after the term of employment or a business or
 322 commercial relationship; or
 323 (C) Both subparagraphs (A) and (B) of this paragraph;
 324 (3) The scope of competition restricted is measured by the business of the employer
 325 or other person or entity in whose favor the restrictive covenant is given; provided,
 326 however, that a court shall not refuse to enforce the provisions of a restrictive
 327 covenant because the person seeking enforcement establishes evidence that a
 328 restrictive covenant has been violated but has not proven that the covenant has been
 329 violated as to the entire scope of the prohibited activities of the person seeking
 330 enforcement or as to the entire geographic area of the covenant; and
 331 (4) Any restriction that operates during the term of an employment relationship,
 332 agency relationship, independent contractor relationship, partnership, franchise,
 333 distributorship, license, ownership of a stake in a business entity, or other ongoing
 334 business relationship shall not be considered unreasonable because it lacks any
 335 specific limitation upon scope of activity, duration, or geographic area so long as it
 336 promotes or protects the purpose or subject matter of the agreement or relationship or
 337 deters any potential conflict of interest.
- 338 13-8-57.
 339 (a) In determining the reasonableness in time of a restrictive covenant sought to be
 340 enforced after a term of employment, a court shall apply the rebuttable presumptions
 341 provided in this Code section.
 342 (b) In the case of a restrictive covenant sought to be enforced against a former
 343 employee and not associated with the sale or ownership of all or a material part of:
 344 (1) The assets of a business, professional practice, or other commercial enterprise;
 345 (2) The shares of a corporation;
 346 (3) A partnership interest;
 347 (4) A limited liability company membership; or

348 (5) An equity interest or profit participation, of any other type, in a business,
 349 professional practice, or other commercial enterprise,
 350 a court shall presume to be reasonable in time any restraint two years or less in duration
 351 and shall presume to be unreasonable in time any restraint more than two years in
 352 duration, measured from the date of the termination of the business relationship.

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

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

358 (2) The shares of a corporation;

359 (3) A partnership interest;

360 (4) A limited liability company membership; or

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

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

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

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

369 (2) The shares of a corporation;

370 (3) A partnership interest;

371 (4) A limited liability company membership; or

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

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

381 13-8-58.

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

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

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

392 (d) In determining the reasonableness of a restrictive covenant between an employer
 393 and an employee, as such term is defined in subparagraphs (A) through (C) of
 394 paragraph (5) of Code Section 13-8-51, a court may consider the economic hardship
 395 imposed upon an employee by enforcement of the covenant; provided, however, that
 396 this subsection shall not apply to contracts or agreements between or among those
 397 persons or entities listed in paragraphs (2) through (7) of subsection (a) of Code Section
 398 13-8-52.

399 13-8-59.

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

403 **PART II**

404 **SECTION 2-1.**

405 Title 50 of the Official Code of Georgia Annotated, relating to state government, is
 406 amended by adding a new chapter to read as follows:

407 "CHAPTER 38

408

409 50-38-1.

410 (a) No contract, compact, or other agreement negotiated between the Governor and any
 411 Indian tribe pertaining to gambling shall be signed by the Governor without the express
 412 approval of the General Assembly by resolution approved by two-thirds of the members
 413 elected to each chamber.

414 (b) Any contract, compact, or other agreement signed by the Governor in violation of
415 this Code section shall be void ab initio, shall not be recognized by the state, and shall
416 be of no force or effect."

417 **PART III**

418 **SECTION 3-1.**

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

423 **SECTION 3.2.**

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