



A monthly newsletter provided by SHRM-Atlanta

Resource

JANUARY/FEBRUARY 2006



IN THIS ISSUE:

<i>A Message from Tom</i>	3
<i>How To Use This Issue</i>	6
<i>Easily Avoidable Non-Compete and Non-Solicit Pitfalls</i>	8
<i>SHRM Certification Course Attendees Obtain PHR/SPHR Designations</i>	9
<i>SHRM-Atlanta Board of Directors</i>	10
<i>SHRM – Senior Executive Committee</i>	15
<i>2005 SHRM-Atlanta Articles</i>	18
<i>USERRA Regulations: An Overdue Guide to Military Leaves and Reemployment Rights</i>	20
<i>Members in the News</i>	22
<i>Members on the Move</i>	22

UPCOMING EVENTS:

- April 27 – EMA-Atlanta Meeting*
- May 4 – Lunch with a Leader Auction*
- May 8 – South Atlanta GEM Meeting*
- May 9 – North Atlanta GEM Meeting*
- May 11 – Northeast Atlanta GE Meeting*
- May 11 – Central Atlanta GEM Meeting*
- May 16 – Northwest Atlanta GEM Meeting*
- May 23 – Career Connections*



www.shrmatlanta.org

Easily Avoidable Non-Compete and Non-Solicit Pitfalls

By J. Matthew Maguire, Jr., BALCH & BINGHAM LLP
(404) 261-6020 • (404) 261-3656 fax
mmaguire@balch.com • www.balch.com

With the increasing mobility of today's workforce, it is only reasonable for employers to wish to protect their investments in employees and customers. A common method of doing so is requiring employees to sign covenants preventing them from competing with the employer or from soliciting their employer's customers after termination. Georgia courts have developed a reputation for being among the most hostile in the nation towards such covenants. This paper identifies the broad themes running through these cases and then narrows in on specific covenants that failed judicial scrutiny due, in many cases, to easily avoidable drafting errors.

A. General Principles

In Georgia, contracts which "may have the effect of or which is intended to have the effect of defeating or lessening competition" are void. Nevertheless, Georgia courts will enforce restrictive covenants if the restraints are reasonable in: (1) duration; (2) geography; and (3) scope of activities. This is a flexible and imprecise test.

Durational limits of two years or less generally fare much better than longer ones. Geographic restraints that are broader than the area in which the employee worked will almost always fail. Restrictions on the employees' post-termination activities, such as his contact with the employer's customers, have a much better chance of surviving if they bear some rational relationship to the work he performed for the employer. To that end, a non-solicit that limits itself to customers with whom the employee had dealings is much more likely to survive than a non-solicit that applies to all customers.

A covenant's validity has more to do with the level of scrutiny it receives from the court than anything else. Due to variations in the relative bargaining power of the parties, a covenant within an employment agreement receives strict scrutiny, a covenant within a professional partnership agreement receives mid-level scrutiny, and a covenant ancillary to the purchase or sale of a business receives slight scrutiny. Not surprisingly, situations frequently arise that blur the three types of covenants. For example, an employee may also be a minority shareholder. In these cases, courts will still apply strict scrutiny if the facts indicate a discrepancy in bargaining power.

The most significant distinction between the three levels of scrutiny is that a court applying strict scrutiny will not "blue pencil" an overbroad covenant to make it enforceable. One overbroad term will doom the entire covenant under strict scrutiny. On the other hand, courts exercising mid-level or slight scrutiny may reduce the

geographic or time restrictions to make the covenant reasonable. Yet, there are limits to the blue pencil rule. For example, a court may not save a covenant by writing in a geographic limitation where there was none to begin with.

Non-compete and non-solicitation covenants stand or fall together, while non-recruitment and nondisclosure covenants are evaluated separately from the rest of the covenants. For example, an invalid non-solicitation covenant will invalidate an otherwise valid non-compete, but it will not invalidate an otherwise valid non-disclosure agreement.

B. Your Restrictive Covenant May Be Invalid If...

It is far easier to recite the general rules governing restrictive covenants than it is to apply them. Georgia case law is littered with reasonable-sounding covenants that were struck down in their entirety because of a single, poorly chosen term or phrase. Some examples are:

1. The covenant lacks a territorial limitation **and** it prohibits the former employee from soliciting customers with whom he had no dealings during his employment. This will always be struck down as overbroad.
2. The territorial limitation was not fixed at the time the covenant was executed because it applies to "any territory added during the course of the agreement." The geographic region must be discernable to the employee at the time he signs the covenant.
3. The territorial limitation exceeds the area serviced by the former employee or, worse yet, it exceeds the area serviced by the employer. Employers do not have legitimate interests preventing the employee from competing in these areas.
4. The territorial limitation is stated in terms of a radius of miles from an undefined term such as "metro-Atlanta." A radius of miles from the City of Atlanta, on the other hand, is acceptable.
5. The non-compete is between the employee and the "Company," defined in the agreement to include all successors in interest. Thus, a larger company's acquisition of a small company could invalidate the smaller company's non-competes by making them overly broad. Non-competes should be reviewed and revised upon any change in control.
6. The non-solicit applies to all clients with whom the former employee worked, even if they ceased to be clients long before the employee's termination.

Courts have found that an employer does not have a legitimate interest in restricting access to former clients.

7. The non-solicit applies to all customers within a specific geographic region whether or not the employee had dealings with them. Or, worse yet, it applies to any customer "whose name became known to employee while in the employ of the employer." These are generally overbroad because they go beyond the employer's legitimate interest in preventing the employee from capitalizing on information and relationships he enjoyed during his employment.
8. The non-compete prohibits the former employee from doing **any** type of work for the employer's competitors or the non-solicit prohibits the former employee from soliciting customers for services that do **not** compete with the employer.
9. The non-compete prohibits the former employee from providing similar services to organizations that do **not** compete with the employer.
10. The non-compete requires the former employee to promise not to engage in or be employed by any business that is "**similar to**" the employer's business. The phrase "similar to" is fatally broad.
11. The non-compete precludes the employee serving as a competitor's officer, stockholder or director.

Courts have held that an employer has no legitimate interest in preventing the employee from accepting a passive role in a competing organization.

12. Although Georgia courts have not drawn a line in the sand, a durational restriction of two years or less will usually be deemed reasonable.

As these examples demonstrate, human resources professionals should work closely with their Georgia attorneys to draft covenants that are effective enough, but not so effective as to be unenforceable. What works for your V.P. of business development may not work for your regional sales manager.



Article prepared by **J. Matthew Maguire, Jr.** Matt is a partner in the Atlanta office of Balch & Bingham LLP, a full-service law firm with offices in Georgia, Alabama, Mississippi and Washington, D.C. Mr. Maguire is a trial lawyer who has both challenged and defended non-compete and non-solicitation covenants in a number of jurisdictions, including Georgia state and federal courts. He was recently named a Georgia Super Lawyer "Rising Star" in the October 2005 edition of Atlanta Magazine.

To obtain more information, including a more thorough article on non-compete and non-solicitation covenants in Georgia, please contact Matt at (404) 760-3506 or mmaguire@balch.com.

SHRM Certification Course Attendees Obtain PHR/SPHR Designations

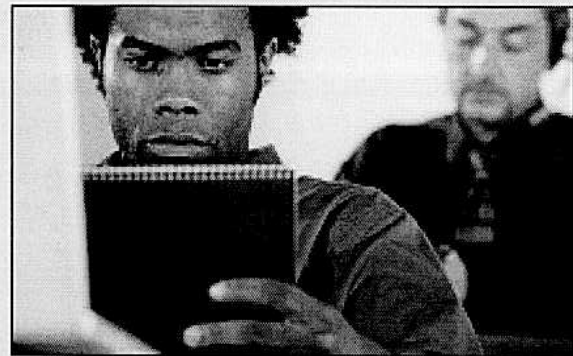
In 2005, SHRM-Atlanta conducted the SHRM-Atlanta Certification Review Course. The course was designed for practicing human resource professionals to hone their HR skills prior to taking the PHR or SPHR examination.

Many of our 2005 class participants were among the Atlanta area candidates to receive their certification:

Susan Quenzer, SPHR
Lydia Wood, SPHR
Sylvia Brewer, SPHR
Sandi Pinneke, PHR
Bev Keller, SPHR
Valerie Knoll, SPHR
Elizabeth Whiteman, PHR
Myrna Maher, PHR
Pat Azogu, SPHR

Congratulations to these human resources professionals for making the jump to the next level by obtaining certification.

Our profession benefits from certification by having basic knowledge and practice standards set into the PHR/SPHR/GPHR designations that have meaning to the human resource and employer communities.



Planning for the Fall 2006 SHRM-Atlanta Certification Review Course is underway. Visit our website at www.shrmatlanta.org for updates.

