A New Law and a Novel Stance From the New Business Court: Two Reasons to Update Your Georgia Employment and Contractor Agreements

May 10, 2022

INSIGHTS

The Situation: Certain employment and independent contractor agreements may not comply with a recently enacted law, or rulings by the new State-wide Business Court. A new law signed by Governor Kemp on May 2nd changes the definition of employment and imposes new penalties for misclassification. In addition, the new Business Court has recently concluded—in conflict with prior federal court decisions—that employee non-solicitation provisions are unenforceable if they do not contain a set geographic territory. Are your agreements compliant?

Act Now:

If the answer to any of the following questions is **no**, you may need to revise your agreements to ensure compliance with these new requirements:

- Does your employee non-solicitation provision specify a geographic territory?
- Can your contractor work for other companies?
- Can your contractor refuse work assignments without consequence?

And if the answer to any of these questions is **yes**, you may need to revise your agreements:

- Does your sales contractor have a minimum number of orders to obtain?
- Does your contractor have to work a minimum number of hours?
- Does your contractor have an assigned territory?

OVERVIEW

The first reason to update your agreements. Certain contractors may be deemed employees under new definition of employment.

Georgia's Employment Security Law governs the collection of funds for the unemployment system. The Georgia Legislature amended the law this session to clarify that certain music industry professionals, and rideshare drivers (like Uber and Lyft), are independent contractors excluded from the definition of "employment." The bill, however, also codified for the first time the factors to determine employee status. Previously, the Georgia Department of Labor—and any court addressing a classification decision by the Department—determining employee status by analyzing a non-exhaustive list of relevant factors to determine if the company exercised "significant control" over the worker. *See, e.g., Sarah Coventry, Inc. v. Caldwell,* 243 Ga. 429, 433–34 (1979).

The new law, House Bill 389, took six frequently referenced factors cited by courts (as well as a catch-all factor) and incorporated them into the definition of employment. In doing so, the Legislature created a situation where a company may be liable for the employment tax, plus statutory penalties, if the individual providing services does not meet each factor. The following table shows the difference between the prior definition and the one recently signed into law:

Prior Definition of Employment	New Definition of Employment
(f) Services performed by an individual for wages shall be deemed to be employment subject to this chapter unless and until it is shown that:	(f) Except as otherwise provided in this Code section, services performed by an individual for wages shall be deemed to be employment subject to this chapter unless and until it is shown that:
(1)(A) Such individual has been and will continue to be free from control or direction over the performance of such services, both under the individual's contract of service and in fact; and	(1)(A) Such individual has been and will continue to be free from control or direction over the performance of such services, both under the individual's contract of service and in fact, as demonstrated by whether the individual: (i) Is not prohibited from working for other companies or holding other employment contemporaneously; (ii) Is free to accept or reject work assignments without consequence; (iii) Is not prescribed minimum hours to work or, in the case of sales, does not have a minimum number of orders to be obtained; (iv) Has the discretion to set his or her own work schedule; (v) Receives only minimal instructions and no direct oversight or supervision regarding the services to be performed, such as the location where the services are to be performed and any requested deadlines;

Prior Definition of Employment	New Definition of Employment
	(vi) When applicable, has no territorial or geographic restrictions; and (vii) Is not required to perform, behave, or act or, alternatively, is compelled to perform, behave, or act in a manner related to the performance of services for wages which is determined by the Commissioner to demonstrate employment, in accordance with this Code section and such rules and regulations as the Commissioner may prescribe; and
(B) Such individual is customarily engaged in an independently established trade, occupation, profession, or business; or	(B) Such individual is customarily engaged in an independently established trade, occupation, profession, or business; or
(2) Such individual and the services performed for wages are the subject of an SS-8 determination by the Internal Revenue Service, which decided against employee status.	(2) Such individual and the services performed for wages are the subject of an SS-8 determination by the Internal Revenue Service, which decided against employee status.

Penalties for noncompliance are $2,500 per individual for companies with less than 100 employees, and $7,500 per individual for companies with 100 or more employees. These penalties are on top of the exposure for tax liability for failure to remit employment taxes to the Department of Labor.

The second reason to update your agreements. The new Business Court refuses to follow decisions by federal courts giving employers flexibility with employee non-solicitation provisions.

When the Georgia Legislature enacted the Georgia Restrictive Covenant Act ("RCA") in 2011, it fundamentally changed the state's public policy to favor the enforcement of non-competes and other restrictive covenants like customer and employee non-solicitation provisions. Prior to the RCA, courts were hostile to certain restrictions and frequently refused to enforce restraints on former employees and contractors. Notably, though, even during this pre-2011 period, courts often enforced employee non-solicitation provisions that lacked a specific geographic territory. Following the passage of the RCA, some courts have continued to enforce employee non-solicitation provisions that lacked a geographic territory. *See, e.g., S. Felt Co., Inc. v. Konesky,* 2020 WL 5199269, at *8 (S.D. Ga. Aug. 31, 2020) (enforcing restriction without territorial limit; citing a line of cases).

Georgia's State-wide Business Court, however, recently held that the express language of the RCA requires employee non-solicitation provisions to satisfy the same requirements as non-competes, including containing a reasonable geographic territory in order to be enforceable. *See Martin v. Hauser,* 2021 WL 1053637 (Ga. Bus. Ct. Mar. 5, 2021). According to the Court, while customer non-solicitation provisions are exempted from the territorial requirement, no exemption exists for employee non-solicitation provisions. This may have been a drafting error by the legislature. After all, employee non-solicitation provisions are not specifically mentioned in the RCA, did not require a territory before the RCA, and the RCA was passed to make it easier in most instances, not harder, to enforce restrictions.

Companies that do not revise their agreements to address this new interpretation may find themselves unable to protect their workforce. While it will be interesting to see if other courts follow the lead of the Business Court in *Martin*, or the contrary line of authority from the federal courts such as in *Konesky*, employers should not wait

until Georgia's appellate courts address the issue. Employers can address the situation now by amending their agreements to specify a territory. The reasonableness of the territory chosen will depend on the specific facts and circumstances.

Parker Hudson attorneys are available to answer any questions or concerns you have regarding the implications of this new law, and new restrictive covenant interpretation, as well as any changes you may need to make to ensure compliance any and all requirements.

AUTHOR

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