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Non-Compete News: Georgia Court of Appeals Clarifies Definition of "Key Employee" Under the Georgia Restrictive Covenants Act

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Executive Summary

The Georgia Restrictive Covenants Act (O.C.G.A. § 13-8-50 *et seq.*) governs non-compete agreements in Georgia entered into after May 2011 and sets forth that such agreements can be used only with respect to certain employees. One context in which non-compete agreements are permitted is where an employee "customarily and regularly" solicits customers or makes sales. Non-compete agreements are also permissible where an employee "perform[s] the duties of a key employee or of a professional."

In a March 5, 2019 decision (*Blair v. Pantera Enters., Inc., 2019 Ga. App. LEXIS 114*), the Georgia Court of Appeals clarified what is required for an employee to be considered a "key employee" under the law. Specifically, the Court concluded that having a key client relationship does not necessarily make an employee a "key employee."

In this case, the trial court found that the employee was a "key employee" under the law; however, the Court of Appeals disagreed and reversed. Since the Georgia Restrictive Covenants Act has only been litigated in a handful of Georgia cases, this decision provides additional guidance regarding the law to employers and employees in the state.

Background

In 2012, Blair (a backhoe operator responsible for maintaining railroads) signed a non-compete agreement with his employer. As he continued working for Pantera Enterprises ("Pantera"), Blair developed a relationship with his employer's client (a railroad company).

Due to the close relationship Blair developed with the client over the years, when he left Pantera and began working for a competitor in 2017, the client followed him. In response, the employer sought to enforce the non-compete agreement, which would have prohibited Blair from working for a competitor and serving the same clients he served while with Pantera.

Before discussing whether the non-compete agreement was enforceable in this case, the Court of Appeals assessed the nature of the employee's job. Blair's job required specialized training, but he "did not have the authority to hire or fire people." Blair did not directly negotiate with customers or clients on behalf of his employer and "was never asked to make sales." Further, he "was never given a customer list."

Given these characteristics, many of the contexts in which the Georgia Restrictive Covenants Act permits non-compete agreements were not applicable. Therefore, unless Blair was a "key

employee" as defined by the Act, the non-compete agreement here would not be enforceable against him.

Defining a "Key Employee"

The Georgia Restrictive Covenants Act defines "key employee" as "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… has gained a high level of notoriety, fame, reputation, or public persona as the employer's representative or spokesperson…."

There is also a second sentence in the definition of "key employee." Thus, the Act goes on to state that the 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."

In this case, the Court of Appeals found that Pantera did not meet the first part of the test because Blair had obtained his good reputation due to his own personal characteristics (e.g. for being trustworthy and reliable) rather than "by reason of [his] employer's investment of time, training, money, trust, exposure, [etc.]." Further, the Court held that the two sentences constitute two portions of the test – both of which must be met to determine that an employee is a "key employee."

Because the Court found that Blair did not qualify as a key employee, it found that he could not be bound by a non-compete agreement. As a result, it found that the employee could continue to serve the client as a backhoe operator in competition with his former employer.

As an aside, the non-compete agreement that Blair had signed was narrow. It only prohibited him from working as a backhoe operator for a competitor serving the same client in Georgia for a period of two years. Under the agreement, he would have been free to serve other railroad companies in the course of his employment with Pantera's competitors. This demonstrates that even narrowly-tailored agreements will not be enforced unless the specific context in which they are used is permitted under the Act.

Employers' Bottom Line

While this decision was a split decision and therefore serves as persuasive – rather than binding – precedent for litigants in the future, it is notable in that the court deemed the non-compete agreement unenforceable. This decision narrows the kinds of employees who may be bound by non-compete agreements.

In order to increase the likelihood that their non-compete agreements are enforceable, employers should review the job duties of employees who are asked to sign non-compete agreements and prepare those agreements in accordance with the law.

Jeff Mokotoff is Co-Chair of FordHarrison's Non-Compete, Trade Secrets and Business Litigation practice group. If you have any questions regarding this decision, please feel free to contact Jeff at jmokotoff@fordharrison.com, or the co-author of this Alert, Kristina Griffin at kgriffin@fordharrison.com, an associate in our Atlanta office and member of the Non-Compete, Trade Secrets and Business Litigation practice group. You may also contact the FordHarrison attorney with whom you usually work.

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