

House Bill 332

By: Representatives Kendrick of the 93rd, McClain of the 100th, Moore of the 95th, Park of the 101st, Stephens of the 164th, and others

A BILL TO BE ENTITLED
AN ACT

1 To amend Article 4 of Chapter 8 of Title 13 of the Official Code of Georgia Annotated,
2 relating to restrictive covenants in contracts, so as to prohibit covenants in agreements
3 between employers and low-wage employees that restrict competition after the term of
4 employment; to require employers to provide prior notification to employees and prospective
5 employees whose employment is conditioned upon the acceptance of a contract containing
6 such covenants; to provide courts with the power to use competition restrictions as remedial
7 measures; to provide for related matters; to provide for an effective date and applicability;
8 to repeal conflicting laws; and for other purposes.

9 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

10 **SECTION 1.**

11 Article 4 of Chapter 8 of Title 13 of the Official Code of Georgia Annotated, relating to
12 restrictive covenants in contracts, is amended by adding a new Code section to read as
13 follows:

14 "13-8-52.1.

15 (a) Prior to making an offer of employment that will require the acceptance of a contract
16 containing a covenant that restricts competition after the term of employment, an employer

17 shall provide the prospective employee with a written statement that employment is
18 conditioned upon the execution of a contract containing such a restrictive covenant.

19 (b) An employer shall notify an employee or prospective employee in writing of a
20 requirement to enter into a contract containing a covenant that restricts competition after
21 the term of employment. Such written notice shall provide a copy of such contract not less
22 than seven days before the employer requires the contract to be signed. Such seven-day
23 written notice shall communicate that the employee may consult with an attorney and
24 negotiate the terms of the contract, if the employee or prospective employee wishes to do
25 so. Nothing contained in this subsection shall be construed as excusing the employer from
26 providing fair and adequate consideration to an employee whose continued employment
27 is conditioned upon the execution of a contract containing a covenant that restricts
28 competition after the term of employment.

29 (c) Failure of the employer to provide written notice as provided in this Code section shall
30 render unlawful any covenant in the agreement or contract that restricts competition after
31 the term of employment, and any such restrictive covenant shall be void and
32 unenforceable."

33 **SECTION 2.**

34 Said article is further amended by revising Code Section 13-8-53, relating to enforcement of
35 covenants, writing requirement, determining competitive status, effect of failure to comply,
36 and time and geographic limitations, as follows:

37 "13-8-53.

38 (a) Notwithstanding any other provision of this chapter, enforcement of contracts that
39 restrict competition shall be permitted during the term of a restrictive covenant, ~~so long as~~
40 provided that such restrictions are reasonable in time, geographic area, and scope of
41 prohibited activities, ~~shall be permitted~~. However, enforcement of contracts that restrict
42 competition after the term of employment, as distinguished from a customer nonsolicitation

43 provision, as described in subsection (b) of this Code section, or a nondisclosure of
44 confidential information provision, as described in subsection (e) of this Code section, shall
45 not be permitted against any employee who does not, in the course of his or her
46 employment:

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

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

51 (3) Perform the following duties:

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

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

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

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

59 (5) Earn greater than \$17.00 per hour or \$35,360.00 annually or is not paid at all because
60 he or she is an unpaid intern or a volunteer, provided that such employee, intern, or
61 volunteer does not receive or have access to trade secrets in the course of such
62 employment.

63 (b) Notwithstanding any other provision of this chapter, an employee may agree in writing
64 for the benefit of an employer to refrain, for a stated period of time following termination,
65 from soliciting, or attempting to solicit, directly or by assisting others, any business from
66 any of such employer's customers, including actively seeking prospective customers, with
67 whom the employee had material contact during his or her employment for purposes of
68 providing products or services that are competitive with those provided by the employer's
69 business. No express reference to geographic area or the types of products or services

70 considered to be competitive shall be required in order for the restraint to be enforceable.
71 Any reference to a prohibition against 'soliciting or attempting to solicit business from
72 customers' or similar language shall be adequate for such purpose and narrowly construed
73 to apply only to: (1) such of the employer's customers, including actively sought
74 prospective customers, with whom the employee had material contact; and (2) products or
75 services that are competitive with those provided by the employer's business.

76 (c)(1) Activities, products, or services that are competitive with the activities, products,
77 or services of an employer shall include activities, products, or services that are the same
78 as or similar to the activities, products, or services of the employer. Whenever a
79 description of activities, products, or services, or geographic areas, is required by this
80 Code section, any description that provides fair notice of the maximum reasonable scope
81 of the restraint shall satisfy such requirement, even if the description is generalized or
82 could possibly be stated more narrowly to exclude extraneous matters. In case of a
83 post-employment covenant entered into prior to termination, any good faith estimate of
84 the activities, products, or services, or geographic areas, that may be applicable at the
85 time of termination shall also satisfy such requirement, even if such estimate is capable
86 of including or ultimately proves to include extraneous activities, products, or services,
87 or geographic areas. The post-employment covenant shall be construed ultimately to
88 cover only so much of such estimate as relates to the activities actually conducted, the
89 products or services actually offered, or the geographic areas actually involved within a
90 reasonable period of time prior to termination.

91 (2) Activities, products, or services shall be considered sufficiently described if a
92 reference to the activities, products, or services is provided and qualified by the phrase
93 'of the type conducted, authorized, offered, or provided within two years prior to
94 termination' or similar language containing the same or a lesser time period. The phrase
95 'the territory where the employee is working at the time of termination' or similar
96 language shall be considered sufficient as a description of geographic areas if the person

97 or entity bound by the restraint can reasonably determine the maximum reasonable scope
98 of the restraint at the time of termination.

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

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

109 (f) Nothing in this article shall be construed as excusing the employer from providing fair
110 and adequate consideration to an employee who signs a contract containing a restrictive
111 covenant after the formation of the employment relationship."

112 **SECTION 3.**

113 Said article is further amended by revising Code Section 13-8-54, relating to judicial
114 construction of covenants, as follows:

115 "13-8-54.

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

119 (b) In any action concerning enforcement of a restrictive covenant, a court shall not
120 enforce a restrictive covenant unless it is in compliance with the provisions of Code
121 Section 13-8-53; provided, however, that if a court finds that a contractually specified
122 restraint does not comply with the provisions of Code Section 13-8-53, then the court may

123 modify the restraint provision and grant only the relief reasonably necessary to protect such
124 interest or interests and to achieve the original intent of the contracting parties to the extent
125 possible.

126 (c) Notwithstanding the absence of a covenant that restricts competition after the term of
127 employment, a court is authorized to grant relief in the form of an injunction preventing the
128 employee from working for a competitor for a limited period of time in a reasonable
129 geographic area and with respect to a reasonable scope of activities if the court finds that
130 such relief is necessary and appropriate to remediate the employee's violations of other
131 covenants or legal obligations, such as a customer nonsolicitation covenant or a
132 nondisclosure covenant, and the contract expressly authorizes such judicial relief."

133 **SECTION 4.**

134 This Act shall become effective upon its approval by the Governor or upon its becoming law
135 without such approval and shall apply to restrictive covenant agreements entered into on or
136 after such date.

137 **SECTION 5.**

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