

# Labor and Employment Law

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## I. INTRODUCTION

This Article surveys recent developments in state statutory and common law that affect labor and employment relations between Georgia employers and employees. Accordingly, it surveys published decisions from the Georgia Court of Appeals and the Georgia Supreme Court from June 1, 2006 to May 31, 2007, as well as selected cases decided by the

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United States District Court, which purported to refine principles of Georgia employment law. This Article also highlights specific revisions to the Official Code of Georgia Annotated ("O.C.G.A.").<sup>1</sup>

## II. RECENT LEGISLATION

### A. *Substance Abuse Testing*

During the survey period, the Georgia General Assembly passed important legislation affecting substance abuse testing.<sup>2</sup> Senate Bill 96<sup>3</sup> amends the existing Georgia statute relating to drug-free workplace programs.<sup>4</sup> It allows employers to conduct alternative methods of drug testing, which is required "in order to qualify for the workers' compensation insurance premium discounts."<sup>5</sup> In addition to retaining the previous methods, the bill states, "Urinalysis conducted by laboratories, testing at the employer worksite with on-site testing kits, or use of oral testing that satisfies testing criteria . . . shall be deemed suitable and acceptable substance abuse testing [methods]."<sup>6</sup> Additionally, for pre-job offer screening, the Bill permits qualified individuals to administer on-site tests or oral tests.<sup>7</sup> By making these additions to the existing statute, the general assembly sought to provide employers with both immediate and easily accessible methods to deter and detect drug and alcohol abuse.<sup>8</sup>

### B. *Employment Security*

The most significant legislation passed during the survey period amended O.C.G.A. section 34-8-35,<sup>9</sup> commonly known as Georgia's

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1. Attorneys practicing labor and employment law have a multitude of reference sources for recent developments in federal legislation and case law. *See generally* THE DEVELOPING LABOR LAW (Patrick Hardin et al. eds., 4th ed. 2001); BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (Paul W. Cane, Jr. et al. eds., 3d ed. & Supps. 1996-2002); Daily Lab. Rep. (BNA). Accordingly, this Article is not intended to cover the latest developments in federal labor and employment law. Rather, this Article is intended only to cover legislative and judicial developments arising under Georgia state law during the survey period.

2. *See* Ga. S. Bill 96, § 1, Reg. Sess. (2007) (amending O.C.G.A. § 34-9-415 (2004)).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *See id.*

9. O.C.G.A. § 34-8-35 (2004 & Supp. 2006).

Employment Security Act.<sup>10</sup> Specifically, this legislation amends the meaning of the term “employment” within the scope of employment security.<sup>11</sup> It dictates the circumstances under which the Georgia Department of Labor is required to pay unemployment benefits.<sup>12</sup> Unlike other areas of employment law, the burden of proof is on the employer to prove that a worker constitutes an independent contractor and does not fall under employee status.<sup>13</sup>

Prior to the amendments, employers had to meet a three part test to prove that a worker was an independent contractor.<sup>14</sup> If the employer satisfied this burden of proof, it was not required to pay unemployment taxes for that individual.<sup>15</sup> The legislature simplified this test by eliminating the second element.<sup>16</sup> An employer now must prove only two elements to remove a worker from employee status: (1) The worker must be free from the employer’s control, and (2) the worker must traditionally practice a separately established trade from that of the employer.<sup>17</sup> Furthermore, the legislature added an alternative basis for defining a worker’s employment status.<sup>18</sup> Under this alternative basis, after an employer considers the aforementioned required elements and concludes that a worker’s status is questionable, it can submit an SS-8 determination form to the United States Internal Revenue Service for a definitive answer.<sup>19</sup> The amended definition of “employment,” under Georgia’s Employment Security Act, is as follows:

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10. Ga. H.R. Bill 443, § 1, Reg. Sess. (2007) (amending O.C.G.A. § 34-8-35).

11. *Id.*

12. *Id.*

13. *Compare* Remediation Res., Inc. v. Balding, 281 Ga. App. 31, 635 S.E.2d 332 (2006) (burden of proof is on the plaintiff to show employee status under respondeat superior), with Ga. H.R. Bill 443, § 1 (Act presumes employment until employer proves otherwise).

14. O.C.G.A. § 34-8-35(f) (amended 2007).

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) 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;

(2) Such service is outside the usual course of the business for which such service is performed or such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(3) Such individual is customarily engaged in an independently established trade, occupation, profession, or business.

*Id.*

15. *See id.*

16. Ga. H.R. Bill 443, § 1.

17. *Id.*

18. *Id.*

19. *See id.*

(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:

(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 (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.<sup>20</sup>

The legislature also amended O.C.G.A. section 34-8-35(n)(17) regarding employment exemptions.<sup>21</sup> Specifically, the common carrier exclusion was expanded to include trips as a basis for remuneration.<sup>22</sup> Additionally, the scope of the written contract that is required between an individual and a common carrier was revised so that the term "employment" shall not include common carriers who deliver persons.<sup>23</sup>

(17) Services performed for a common carrier of property, persons, or property and persons by an individual consisting of the pickup, transportation, and delivery of property, persons, or property and persons; provided that:

.....

(B) Remuneration for the individual is on the basis of commissions, trips, or deliveries accomplished;

.....

(F) The written contract does not prohibit such individual from the pickup, transportation, or delivery of property, persons, or property and persons for more than one common carrier or any other person or entity . . . .<sup>24</sup>

### C. *Firearms Transportation*

Senate Bill 43<sup>25</sup> ("S.B. 43"), which would permit employees to keep guns in vehicles parked on company property, did not survive the legislative affair commonly known as "Crossover Day."<sup>26</sup> Despite this

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20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Ga. S. Bill 43, § 1, Reg. Sess. (2007) (failing to pass the senate vote).

26. *Id.*

setback, S.B. 43 was later incorporated into House Bill 89<sup>27</sup> (“H.B. 89”), which was to be considered by the senate. However, deliberations were delayed in light of the Virginia Tech shootings, which occurred the day before consideration of the Bill.<sup>28</sup> Subsequently, the senate chose not to add H.B. 89 to the calendar before the legislative session ended.<sup>29</sup>

Proponents of H.B. 89 are wary of amending the original bill to add S.B. 43. Although some would like both bills to pass, others fear that incorporating S.B. 43 into H.B. 89 would significantly reduce the chances of H.B. 89 becoming law. Prior to its amendment, H.B. 89 was expected to pass with no problems once it was introduced on the senate floor. However, the amended H.B. 89 will likely split votes. Accordingly, the chance of the amended H.B. 89 becoming law slowly diminishes with the ghost of S.B. 43.

### III. EMPLOYMENT LAW PRINCIPLES—CASE LAW

#### A. *Wrongful Termination*

**1. Employment-at-Will.** Georgia’s employment-at-will doctrine has two notable characteristics. First, either the employee or employer may terminate the employment relationship at any time, with or without cause.<sup>30</sup> Second, and a corollary of the first characteristic, the employee may not successfully maintain a wrongful termination claim upon the termination of an employment-at-will contract.<sup>31</sup>

Although the employment-at-will doctrine is gradually eroding in other jurisdictions,<sup>32</sup> O.C.G.A. section 34-7-1<sup>33</sup> provides that employment

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27. Ga. H.R. Bill 89, § 3, Reg. Sess. (2007) (removed from the General Calendar and committed to the Rules Committee in the senate); see *Carlos Campos, Legislature 2007: Rampage Silences Gun Bill in Georgia*, ATLANTA J. CONST., Apr. 19, 2007, at B1.

28. Campos, *supra* note 27, at B1.

29. Ga. Gen. Assembly, available at [http://www.legis.ga.gov/legis/2007\\_08/sum/hb89.htm](http://www.legis.ga.gov/legis/2007_08/sum/hb89.htm).

30. See generally JAMES W. WIMBERLY, JR., GEORGIA EMPLOYMENT LAW § 1-6, at 20-21 (3d ed. 2000 & Supp. 2005).

31. *Id.*

32. See Mark A. Fahleson, *The Public Policy Exception to Employment At Will—When Should Courts Defer to the Legislature?*, 72 NEB. L. REV. 956 (1993); Melanie Robin Galberry, *Employers Beware: South Carolina’s Public Policy Exception to the At-Will Employment Doctrine is Likely to Keep Expanding*, 51 S.C. L. REV. 406 (2000); Kimberly Anne Huffman, *Salt v. Applied Analytical, Inc.: Clarifying the Confusion in North Carolina’s Employment-at-Will Doctrine*, 70 N.C. L. REV. 2087 (1992); Cortlan H. Maddux, Comment, *Employers Beware! The Emerging Use of Promissory Estoppel as an Exception to Employment at Will*, 49 BAYLOR L. REV. 197 (1997); Richard J. Pratt, Comment, *Unilateral Modification of Employment Handbooks: Further Encroachments on the*

contracts in Georgia are at-will unless the parties implicitly or explicitly contract otherwise.<sup>34</sup> Generally, this means that in the absence of a specified length of employment, the relationship is employment-at-will.<sup>35</sup> Contract provisions specifying “permanent employment, employment for life, or employment until retirement” are indefinite, and therefore, they are employment-at-will contracts.<sup>36</sup>

**2. Terms of an At-Will Contract.** In an employment-at-will contract, the employee agrees to work for the reasonable salary he or she is paid.<sup>37</sup> If, for example, the employee does not like the salary, or the employer feels that the employee is not worth the agreed upon salary, either party is free to terminate the employment relationship.<sup>38</sup> However, *CPD Plastering, Inc. v. Miller*<sup>39</sup> illustrates that unless a forfeiture clause exists, a terminable-at-will employee shall not be deprived “of earned commissions, even if those commissions became payable after termination.”<sup>40</sup>

In *CPD Plastering*, the Georgia Court of Appeals held that a former employee was entitled to certain commissions earned after termination, even though some of the contingent bids were not completed until after the employee left.<sup>41</sup> The employee, Miller, and the employer, CPD Plastering, entered into an oral agreement in which Miller received a commission for each bid CPD Plastering received that he helped secure. Miller prepared commission sheets every two years; however, due to Y2K complications, he was unable to complete commission sheets beginning in 1998. In addition, CPD Plastering converted to a new system after 2000 that no longer required Miller to prepare the sheets. Thereafter, disputes arose that resulted in Miller voluntarily leaving CPD Plastering when the parties could not resolve the calculation of his commissions. CPD Plastering had not paid him for any commissions from 1998 to 2002. Believing that CPD Plastering owed him additional commission payments, Miller filed suit to recover the unpaid money.<sup>42</sup>

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*Employment-at-Will Doctrine*, 139 U. PA. L. REV. 197 (1990).

33. O.C.G.A. § 34-7-1 (2004 & Supp. 2006).

34. *Id.*

35. *See generally* WIMBERLY, *supra* note 30, § 1-6, at 20-21.

36. *Id.* at 20.

37. *See id.*

38. *See id.* at 20-21.

39. 284 Ga. App. 172, 643 S.E.2d 392 (2007).

40. *Id.* at 175, 643 S.E.2d at 395.

41. *Id.*

42. *Id.* at 172-73, 643 S.E.2d at 393.

The court rejected CPD Plastering's argument that Miller was not entitled to commissions that were open while he was employed, but closed after his departure.<sup>43</sup> Nowhere did the agreement obligate Miller to engage in post-bid work to receive his commission.<sup>44</sup> CPD Plastering even admitted that the oral agreement was "to pay a commission for jobs bid by Gerald Miller," and the court emphasized that the agreement centered solely on the bid.<sup>45</sup> Additionally, the court reasoned that because the oral agreement did not contain a forfeiture clause, a terminable-at-will employee, such as Miller, may recover certain compensation, including commissions, for services already rendered.<sup>46</sup> Accordingly, the court affirmed the lower court's grant of summary judgment in favor of the employee regarding the unpaid commissions.<sup>47</sup>

**3. Quantum Meruit.** In *Walker Electric Co. v. Byrd*,<sup>48</sup> the Georgia Court of Appeals affirmed that an employee's at-will status does not preclude a cause of action for recovery of the value of services already rendered.<sup>49</sup> The employee, Byrd, filed suit for breach of contract, claiming that Walker Electric breached its oral agreement regarding his compensation. The parties agreed that Byrd would be paid \$40 as per diem compensation, in addition to his hourly wages.<sup>50</sup> The employer's argument that "an at-will employee may not sue for breach of contract" was rejected, and instead the court held that because Byrd had already rendered services, his employment status was not decisive.<sup>51</sup> Further, the court reasoned that although the case involved an at-will employee who received per diem compensation under an oral agreement, it was analogous to a case in which the same type of employee alleged he received less pay in dollars per hour than the amount to which he originally agreed.<sup>52</sup> Having concluded that Byrd's at-will status did not bar his cause of action, the court held that Byrd could recover for the services rendered before termination, as long as an oral agreement was

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43. *Id.* at 175, 643 S.E.2d at 395.

44. *Id.*

45. *Id.* (emphasis omitted).

46. *Id.* at 175-76, 643 S.E.2d at 395 (citing *E.D. Lacey Mills, Inc. v. Keith*, 183 Ga. App. 357, 359-60, 359 S.E.2d 148, 153 (1987)).

47. *Id.* at 176, 643 S.E.2d at 395.

48. 281 Ga. App. 190, 635 S.E.2d 819 (2006).

49. *Id.* at 192, 635 S.E.2d at 820.

50. *Id.* at 190, 635 S.E.2d at 820.

51. *Id.* at 191, 635 S.E.2d at 820.

52. *Id.*

made.<sup>53</sup> Accordingly, the court of appeals affirmed the trial court's denial of summary judgment for the employer and left the issue of whether there was an oral agreement to be determined by the trial court.<sup>54</sup>

In *Powell Co. v. McGarey Group, LLC*,<sup>55</sup> the United States District Court for the Northern District of Georgia held that as a matter of law, if the conditions of an express contract govern an employment relationship, an employee cannot seek recovery under a quantum meruit claim.<sup>56</sup> In this case, Powell, an employee of McGarey, sued McGarey for unpaid earnings. The parties had previously entered into a written contract, which contained a renewable clause.<sup>57</sup> Throughout the duration of the contract, both parties acted pursuant to its terms. Moreover, when the contract expired, both parties continued to act under its terms, thereby impliedly consenting to the renewal of the contract.<sup>58</sup>

The court found that the terms of the contract regarding the employee's additional compensation were ambiguous and that the issue could not be resolved in the employee's favor without extrinsic evidence.<sup>59</sup> Because the employee lacked such evidence, he pursued an alternative method of recovery—a quantum meruit claim.<sup>60</sup> The court noted that an express contract continued to exist through its renewal and held that the employee's quantum meruit claim could not stand unless the employee presented enough evidence to the contrary to raise a question of fact.<sup>61</sup> The court reaffirmed the principle that "implied and express contract[s] regarding the same subject matter cannot exist."<sup>62</sup> Accordingly, because the plaintiff lacked sufficient evidence to raise a question of fact, the court found in favor of the employer regarding the employee's quantum meruit claim.<sup>63</sup>

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53. *Id.* at 192, 635 S.E.2d at 820.

54. *Id.*

55. No. 1:05-CV-2614-JEC, 2007 WL 951759 (N.D. Ga. Mar. 28, 2007).

56. *Id.* at \*13.

57. *Id.* at \*1-2.

58. *Id.* at \*13.

59. *Id.* at \*12.

60. *Id.* at \*13.

61. *Id.*

62. *Id.* (citing *Haldi v. Watson*, 240 Ga. App. 801, 802, 522 S.E.2d 696, 698 (1999)).

63. *Id.*

*B. Torts Associated with Employment*

**1. Negligent Hiring and Retention.** Under O.C.G.A. section 34-7-20,<sup>64</sup> “The employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency . . . .”<sup>65</sup> For an employee to sustain an action for negligent hiring and retention, he or she must show that the employer “knew or in the exercise of ordinary care should have known that . . . the employee it hired and retained to perform duties . . . was unsuitable for that position because he [or she] posed a reasonably foreseeable risk of personal harm to [individuals like the plaintiff.]”<sup>66</sup> “The employer is subject to liability only for such harm as is within the risk.”<sup>67</sup> “Generally, the determination of whether an employer used ordinary care in hiring an employee is a jury issue.”<sup>68</sup>

Courts generally rule in favor of an employer when there is no evidence showing the employer knew that an employee was unsuited for a position or that an employer ignored its own policy.<sup>69</sup> However, in *Western Industries, Inc. v. Poole*,<sup>70</sup> the court turned the case over to a jury even though there was no evidence the employer knew or should have known that one of its employees had a bad driving history.<sup>71</sup> The court reasoned that because the employer failed to follow its own hiring policy of requiring driving records prior to employment, a reasonable jury could conclude the employer should have known the employee had a bad driving history.<sup>72</sup> In this case, the employer failed to perform the required driving background check on the employee, which violated the employer’s hiring policy.<sup>73</sup> Moreover, the employee lied about his driving history on his application, claiming that he had not been in any accidents, and his license had not been suspended in the past three

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64. O.C.G.A. § 34-7-20 (2004).

65. *Id.*

66. *Munroe v. Universal Health Servs., Inc.*, 277 Ga. 861, 863, 596 S.E.2d 604, 606 (2004).

67. *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 213 cmt. d (1958)).

68. *Tecumseh Prods. Co. v. Rigdon*, 250 Ga. App. 739, 740, 522 S.E.2d 910, 912 (2006) (citing *Sparlin Chiropractic Clinic v. TOPS Pers. Servs.*, 193 Ga. App. 181, 181, 387 S.E.2d 411, 412 (1989)).

69. *W. Indus., Inc. v. Poole*, 280 Ga. App. 378, 382, 634 S.E.2d 118, 121-22 (2006).

70. 280 Ga. App. 378, 634 S.E.2d 118 (2006).

71. *Id.* at 382, 634 S.E.2d at 122.

72. *Id.*

73. *Id.* at 379, 634 S.E.2d at 120.

years. After being injured by the employee, the plaintiff, Poole, sued the employer for negligent hiring and retention.<sup>74</sup>

The Georgia Court of Appeals reaffirmed that “[t]he appropriate standard of care in a negligent hiring [and] retention action is whether the employer knew or should have known the employee was not suited for the particular employment.”<sup>75</sup> Because Western Industries did not perform a driver background check on the employee, the court held that a jury could find that the employer should have known the employee was unsuited for a driving position.<sup>76</sup> Thus, the court concluded that a reasonable jury could find the employer liable for negligent hiring and retention because the employer failed to follow its own hiring procedures.<sup>77</sup> Accordingly, the court affirmed the lower court’s denial of summary judgment.<sup>78</sup>

Similarly, in *Remediation Resources, Inc. v. Balding*,<sup>79</sup> the court of appeals denied an employer’s motion for summary judgment when an employee driving a company truck ran a stop sign and killed another driver.<sup>80</sup> The court reasoned that despite the employee’s excellent driving record, a reasonable jury could find that the employer should have foreseen an injury occurring when it lacked policy manuals governing an employee’s “conduct while driving a company vehicle.”<sup>81</sup> In addition, the employer did not keep “driver history or qualification files for any employees.”<sup>82</sup> Although it is unnecessary for an employer to anticipate the precise injuries a future plaintiff may sustain, the court emphasized that an employer has a duty to exercise ordinary care when hiring employees.<sup>83</sup> Accordingly, an employer should not hire individuals that it knows or should know will pose a risk of harm to others.<sup>84</sup> Because Remediation Resources did not have a policy regarding employee drivers and did not perform driving background checks, the court denied summary judgment in its favor, reasoning that a jury could

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74. *Id.* at 379-80, 634 S.E.2d at 120.

75. *Id.* at 381-82, 634 S.E.2d at 121 (emphasis omitted) (quoting *Patterson v. Se. Newspapers, Inc.*, 243 Ga. App. 241, 245, 533 S.E.2d 119, 123 (2000)).

76. *Id.* at 382, 634 S.E.2d at 122.

77. *Id.*

78. *Id.* at 383, 634 S.E.2d at 123.

79. 281 Ga. App. 31, 635 S.E.2d 332 (2006).

80. *Id.* at 31, 635 S.E.2d at 333.

81. *Id.* at 34, 635 S.E.2d at 335.

82. *Id.*

83. *Id.*

84. *Id.*

determine that the employer should have known its employees posed a risk to others.<sup>85</sup>

*Western Industries, Inc. and Remediation Resources, Inc.* are recent examples that underscore the importance to employers of documenting, implementing, and consistently enforcing policies and procedures regarding employee hiring and retention.

“[I]n order to bring a claim for negligent retention under Georgia law, a plaintiff must either demonstrate a physical impact [or] pecuniary loss or show that the defendant’s conduct was ‘wilful or wanton and was directed to harm them.’”<sup>86</sup> Punitive damages are available to a plaintiff who satisfies the elements of a negligent retention claim.<sup>87</sup> Moreover, if it is shown by clear and convincing evidence that there was specific intent to cause harm, there is “no limitation regarding the amount which may be awarded as punitive damages.”<sup>88</sup>

In *Tomczyk v. Jocks & Jills Restaurants, LLC*,<sup>89</sup> a former employee, Tomczyk, sued her employer, seeking punitive damages for negligent retention.<sup>90</sup> The jury rejected Tomczyk’s assertion that she suffered physical injury but agreed that the employer’s conduct towards her was malicious, willful, or wanton. Even though the jury found that Tomczyk established a negligent retention claim, it did not find that the employer displayed specific intent to cause harm.<sup>91</sup> The district court rejected the employer’s argument that a finding of “no specific intent to cause harm’ . . . precludes a finding of liability under a non-physical injury negligent retention claim.”<sup>92</sup> Instead, the court found that “a jury finding of ‘willful or wanton’ acts ‘directed’ [towards a plaintiff] along with a finding that there was no ‘specific intent to cause harm’” can exist simultaneously.<sup>93</sup> Accordingly, the plaintiff satisfied the elements of a negligent retention claim.<sup>94</sup>

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85. *Id.*

86. *Tomczyk v. Jocks & Jills Rests., LLC*, No. 1:00-CV-3417-JOF, 2007 WL 781328, at \*9 (N.D. Ga. Mar. 6, 2007) (quoting *Evans v. Willis*, 212 Ga. App. 335, 337, 441 S.E.2d 770, 773 (1994)).

87. *Id.*

88. *Id.* (quoting O.C.G.A. § 51-12-5.1(f) (2000)).

89. No. 1:00-CV-3417-JOF, 2007 WL 781328 (N.D. Ga. Mar. 6, 2007).

90. *Id.* at \*1.

91. *See id.* at \*9.

92. *Id.*

93. *Id.*

94. *Id.* However, the court vacated \$200,000 of the plaintiff’s punitive damages award. *Id.* at \*10.

**2. Respondeat Superior.** Under the doctrine of respondeat superior, an employer may be held vicariously liable for negligence or intentional torts of employees acting within the scope of their employment.<sup>95</sup> The following two elements must be satisfied to hold an employer vicariously liable for the torts of his or her employee: “[F]irst, the [employee] must be in furtherance of the [employer’s] business; and, second, [the employee] must be acting within the scope of [the employer’s] business.”<sup>96</sup> Vicarious liability under respondeat superior does not apply to the acts of independent contractors.<sup>97</sup>

For example, in *Cotton States Mutual Insurance Co. v. Kinzalow*,<sup>98</sup> the Georgia Court of Appeals held that an insurance agent, under the circumstances, was an independent contractor for purposes of the respondeat superior claim.<sup>99</sup> In this case, two former employees sued Cotton States under the doctrine of respondeat superior for their former supervisor’s conduct.<sup>100</sup> The lower court found that there was a question of fact regarding whether the supervisor was an independent contractor and denied Cotton States’ motion for summary judgment.<sup>101</sup> However, the Georgia Court of Appeals reversed, holding that the supervisor was an independent contractor as a matter of law, thereby relieving the employer of liability.<sup>102</sup> The test to determine whether an employee is an independent contractor is “whether the contract gives, or the employer assumes, the right to control the time, manner, and method of executing the work as distinguished from the right merely to require certain definite results in conformity to the contract.”<sup>103</sup> The court further explained:

Where the contract of employment clearly denominates the other party as an independent contractor, that relationship is presumed to be true unless the evidence shows that the employer assumed such control. On the other hand, where the contract specifies that the employee’s status shall be that of independent contractor but at the same time provides that he shall be subject to any rules or policies of the employer which may be adopted in the future, no such presumption arises.<sup>104</sup>

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95. CHARLES R. ADAMS, III, *GEORGIA LAW OF TORTS* § 7-2, at 263 (2d ed. 2002).

96. *Id.*

97. *Id.*

98. 280 Ga. App. 397, 634 S.E.2d 172 (2006).

99. *Id.* at 399, 402, 634 S.E.2d at 175-76.

100. *Id.* at 397, 634 S.E.2d at 172.

101. *Id.* at 399, 634 S.E.2d at 174.

102. *Id.*, 634 S.E.2d at 175.

103. *Id.* at 400, 634 S.E.2d at 175.

104. *Id.*

Here, the employment contract expressly stated that Sweet, the former supervisor, was

“not an employee of [Cotton States] for any purpose,” but was rather “an independent contractor for all purposes, having the right to exercise independent judgment as to the time, place and manner of soliciting policies, servicing Policyholders, and otherwise carrying out the provisions of th[e] Contract and [was] not subject to the control of [Cotton States] except as set forth herein.”<sup>105</sup>

Additionally, Sweet set his own schedule, had exclusive control over his subordinates, and was responsible for business expenses, such as paying taxes and filing returns, maintaining liability insurance, and acquiring the appropriate business license for his practice.<sup>106</sup> Nonetheless, the contract contained certain restrictions and requirements. For example, Sweet was to keep accurate records of all his sales, and Cotton States had the authority to monitor these activities.<sup>107</sup> The court reasoned that “[s]uch activity evidences Cotton States’ right to require certain results under its agency contract, as opposed to its controlling of the time, method and manner by which the results are achieved.”<sup>108</sup>

The court held that Cotton States’ willingness to supply Sweet with materials for his business did not illustrate its ability to control Sweet’s operations, nor did Sweet’s submission to advertising restrictions interfere with his daily operations.<sup>109</sup> The court further noted that “advertising restrictions do not make [a plaintiff] an employee [as opposed to an independent contractor].”<sup>110</sup> Along with other records, the employment contract provided sufficient evidence to establish a presumption that Cotton States did not control the time, manner, and method of Sweet’s daily operations, and therefore, the court held that Sweet was an independent contractor.<sup>111</sup> Accordingly, Cotton States was not subject to vicarious liability under the doctrine of respondeat superior for Sweet’s misconduct, and summary judgment in the employer’s favor was appropriate.<sup>112</sup>

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105. *Id.* (brackets in original).

106. *Id.*

107. *Id.* at 401, 634 S.E.2d at 176.

108. *Id.*

109. *Id.*

110. *Id.* at 402, 634 S.E.2d at 176 (second brackets in original) (quoting *Lockett v. Allstate Ins. Co.*, 364 F. Supp. 2d 1368, 1378 (M.D. Ga. 2005)).

111. *Id.*

112. *Id.*

### C. Restrictive Covenants

**1. Noncompete Agreements.** Agreements that place general restraints on trade and have the effect of lessening competition and encouraging monopolies are against public policy and consequently void.<sup>113</sup> Generally, noncompete agreements are disfavored in contractual relations because they place restrictions on trade, thereby thwarting competition.<sup>114</sup> Nonetheless, courts will uphold a noncompete agreement when the agreement merely places a partial restraint upon trade.<sup>115</sup> In general, a noncompete agreement is valid as a partial restraint on trade if the agreement is in writing and is reasonable in duration, territorial coverage, and the scope of activities prohibited.<sup>116</sup> Whether the terms are reasonable is a question of law for the court to decide.<sup>117</sup> However, depending on the type of contract, the court will apply different levels of scrutiny to determine the reasonableness of the contract.<sup>118</sup> If the noncompete agreement is ancillary to an employment agreement, a stricter standard is applied, and if any provision of the agreement is considered overbroad or unreasonable, the entire agreement is invalid.<sup>119</sup> But, if the agreement is pursuant to a contract for the sale of a business, a less stringent standard allows for broader provisions, and even if one provision is deemed overbroad or unreasonable, the court may “blue pencil” to rewrite or sever the overly broad provision.<sup>120</sup>

In *Impreglon, Inc. v. Newco Enterprises, Inc.*,<sup>121</sup> the United States District Court for the Northern District of Georgia held that a non-compete agreement prohibiting a person from practicing a particular business activity in all fifty states is generally overbroad and unenforceable.<sup>122</sup> Additionally, according to the court, prohibiting a person from engaging in business activities by referencing the employer’s business is also overbroad and unenforceable for lack of specificity.<sup>123</sup> Impreglon and Jarrell entered into an employment agreement that included a

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113. See O.C.G.A. § 13-8-2 (1982 & Supp. 2006).

114. See WIMBERLY, *supra* note 30, § 2-11, at 75.

115. *Id.*

116. *W.R. Grace & Co. v. Mouyal*, 262 Ga. 464, 465, 422 S.E.2d 529, 531 (1992).

117. WIMBERLY, *supra* note 30, § 2-11, at 76.

118. *Id.*

119. See *id.* § 2-11, at 75-76.

120. See *id.* § 2-11, at 76.

121. No. 1:05-CV-2563-RWS, 2007 WL 1020834 (N.D. Ga. Mar. 30, 2007).

122. *Id.* at \*11-12.

123. *Id.* at \*11.

noncompete clause. When Jarrell ended employment with Impreglon, he decided to work for Newco, a competing company. Thereafter, Impreglon sued Jarrell for breach of the noncompete agreement.<sup>124</sup>

Because the noncompete agreement was included in Jarrell's employment contract, and the agreement was put into effect after his termination, the court found that it was ancillary to Jarrell's employment and applied strict scrutiny.<sup>125</sup> The noncompete agreement included both a geographic restriction and a scope of activity restriction.<sup>126</sup> Jarrell was prohibited "from 'engag[ing] in the same business, or essentially the same business, as that of the Corporation' anywhere 'within the territorial United States' for a period of two years following his termination from Impreglon."<sup>127</sup> The court rejected Impreglon's argument that the geographic restriction was reasonable because it was a nationwide business.<sup>128</sup> In fact, the court found there was a question regarding whether Impreglon was a nationwide business.<sup>129</sup> Impreglon did not operate in all fifty states and did not conduct business, or even appear able to conduct business, in Hawaii or Alaska.<sup>130</sup> Because the geographic restriction was subject to the highest level of scrutiny, the court found that prohibiting Jarrell from engaging in business in all fifty states was overbroad and unenforceable when Impreglon did not even conduct business in at least two of the states.<sup>131</sup>

In addition, the court considered whether prohibiting Jarrell from engaging in the same business, or essentially the same business, was specific enough to meet the strict scrutiny standard.<sup>132</sup> The court concluded that the scope of activity restriction was overbroad and unenforceable.<sup>133</sup> According to the court, the noncompete agreement did not adequately specify the activities in which Jarrell was prohibited from engaging.<sup>134</sup> The court found that the prohibitions were "indefinite business activities,"<sup>135</sup> meaning that the prohibited activities were common in the workplace and could virtually restrain Jarrell from

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124. *Id.* at \*1-3.

125. *Id.* at \*10.

126. *See id.* at \*11.

127. *Id.* (brackets in original).

128. *See id.*

129. *Id.*

130. *Id.*

131. *See id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

engaging in a wide variety of business activities.<sup>136</sup> An agreement “not to engage in or be employed by any business similar to employer’s business”<sup>137</sup> lacks specificity and could significantly limit Jarrell’s opportunity for employment.<sup>138</sup> Accordingly, the United States District Court denied Impreglon’s motion for summary judgment regarding the noncompete agreement.<sup>139</sup>

**2. Nonsolicitation Agreements.** In *Variable Annuity Life Insurance Co. v. Joiner*,<sup>140</sup> the United States District Court for the Southern District of Georgia found that a nonsolicitation covenant executed between an employer, Variable Annuity Life Insurance Company (“VALIC”), and former employees, Bobby and Kimberly Joiner, met the reasonableness test and was therefore enforceable.<sup>141</sup> As a pre-employment condition, the Joiners signed the following nonsolicitation covenant:

“During the term of this Agreement and for a period of one (1) year after its termination, Registered Representative will not directly or indirectly induce or attempt to induce any Protected Customer to either (a) end or alter his or her relationship with Broker-Dealer or Protected Companies, or (b) accept business relating to competing products or services from any Protected Customer, except in the performance of his or her regular duties as a Registered Representative of Broker-Dealer. A ‘Protected Customer’ is defined as any person who is or was a customer of Broker-Dealer or its Protected Companies, and who was within Registered Representative’s Territory and assigned to Registered Representative at any time during the one-year period immediately preceding termination of this Agreement.”<sup>142</sup>

Thereafter, the Joiners decided to leave VALIC and pursue a career with Merrill Lynch, a competitor of VALIC. After their departure, the Joiners solicited forty of VALIC’s high-paying clients to move their accounts to Merrill Lynch. Moreover, ninety percent of VALIC’s customers that rolled their accounts to Merrill Lynch were solicited directly by the Joiners.<sup>143</sup> VALIC subsequently sued the Joiners for

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136. *See id.*

137. *Id.* (internal quotation marks omitted) (quoting *Howard Schultz & Assocs. v. Broniec*, 239 Ga. 181, 184-85, 236 S.E.2d 265, 268 (1977)).

138. *See id.* at \*11-12.

139. *Id.* at \*12.

140. 454 F. Supp. 2d 1297 (S.D. Ga. 2006).

141. *Id.* at 1303.

142. *Id.* at 1300.

143. *Id.* at 1301.

breach of the nonsolicitation covenant.<sup>144</sup> Because the covenant was a pre-condition of employment with VALIC and the Joiners were powerless in negotiating the terms of the agreement, the court held that the agreement was ancillary to the employment contract and therefore subject to strict scrutiny.<sup>145</sup>

“Under Georgia law, restrictive covenants are enforceable if the restraint imposed: (1) is reasonable; (2) is founded on valuable consideration; (3) is reasonably necessary to protect the interest of the party in whose favor it is imposed; and (4) does not unduly prejudice the interests of the public.”<sup>146</sup> Here, the nonsolicitation agreement was founded on valid consideration because both parties signed the covenant.<sup>147</sup> Furthermore, to determine the reasonableness of a nonsolicitation agreement, the court applies a three-part test to examine the elements of duration, territorial coverage, and scope of activity.<sup>148</sup> The Joiners signed the agreement promising not to solicit, directly or indirectly, protected customers to either end their business relations with VALIC or accept business from VALIC competitors.<sup>149</sup> The court rejected the argument that the covenant was unreasonable, and instead found that “VALIC narrowly tailored the nonsolicitation covenant at issue as reasonably necessary to protect its valuable confidential and proprietary information.”<sup>150</sup> Accordingly, the court held that the nonsolicitation covenant was enforceable against the former employees.<sup>151</sup>

#### D. Trade Secrets

Unlike patents and copyrights, which are exclusively federal issues, trade secrets are regulated by state statutes.<sup>152</sup> The Georgia Trade Secrets Act of 1990<sup>153</sup> protects trade secrets from misappropriation.<sup>154</sup> Under this Act,

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144. *Id.* at 1299.

145. *See id.* at 1302. Rejecting the employees’ argument that the restrictive covenant did not constitute an employment agreement, the court quoted Judge Edenfield, who stated, “One can call a stallion a cow until one tries to get milk from it.” *Id.* (quoting *Wachovia Ins. Servs., Inc. v. Paddison*, No. 406CV083, 2006 U.S. Dist. LEXIS 66463, at \*26 (S.D. Ga. July 18, 2006)).

146. *Id.* (citing *W.R. Grace & Co.*, 262 Ga. at 465, 422 S.E.2d at 531).

147. *Id.* at 1302-03.

148. *Id.* at 1303.

149. *Id.* at 1302-03.

150. *Id.* at 1303.

151. *Id.* The court also rejected the Joiners’s argument that the covenant was “unenforceably ambiguous.” *Id.*

152. *See generally* WIMBERLY, *supra* note 30, § 2-15, at 92.

153. O.C.G.A. §§ 10-1-760 to -767 (2000).

154. WIMBERLY, *supra* note 30, § 2-15, at 93.

“Trade secret” means information [which] . . . :

(A) Derives economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>155</sup>

“A person misappropriates a trade secret when he ‘acquires, uses or discloses a trade secret using improper means, or acquires a trade secret from a person who he knows or has reason to know acquired the trade secret by improper means.’”<sup>156</sup> Generally, an injunction is sought by the owner of a trade secret to prohibit any misappropriation.<sup>157</sup> However, the owner of a trade secret who is injured by misappropriation may also seek damages for the “actual loss and value of the trade secret.”<sup>158</sup>

Information constituting a trade secret covers an array of areas “including, but not limited to, technical or nontechnical data, a formula, a pattern, a compilation, a program, a device, a method, a technique, a drawing, a process, financial data, financial plans, product plans, or a list of actual or potential customers or suppliers.”<sup>159</sup> For example, in *Hilb, Rogal & Hamilton Co. of Atlanta v. Holley*,<sup>160</sup> the Georgia Court of Appeals held that “[t]angible customer lists are the property of the employer and may warrant protection as trade secrets.”<sup>161</sup> In this case, the former employee signed a confidentiality agreement promising to keep customer lists confidential during and after his employment with Hilb, Rogal & Hamilton (“HRH”).<sup>162</sup> The agreement read in part:

“In order to protect the value of Employer’s business, Employee covenants and agrees that, in the event of the termination of his employment, whether voluntary or involuntary, he shall not directly or indirectly as an owner, stockholder, director, employee, partner, agent, broker, consultant or other participant during the Restricted Period:  
(a) contact or solicit or accept an entreaty from, a Known Customer for the purpose of providing Prohibited Services to such Known Customer;

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155. O.C.G.A. § 10-1-761(4).

156. WIMBERLY, *supra* note 30, § 2-15, at 94.

157. *See id.* § 2-15, at 93.

158. *Id.* § 2-15, at 94.

159. O.C.G.A. § 10-1-761(4).

160. 284 Ga. App. 591, 644 S.E.2d 862 (2007).

161. *Id.* at 597, 644 S.E.2d at 867.

162. *Id.*

- (b) contact or solicit, or accept an entreaty from, a Prospective Customer for the purpose of providing Prohibited Services to Prospective Customer; and
- (c) engage in the Business in the Restricted Area without the prior written consent of Employer and HRH.”<sup>163</sup>

After his departure from HRH, the employee, Holley, took the customer list, which was in the form of an electronic organizer, and used it to look up the phone numbers of HRH customers.<sup>164</sup> Subsequently, HRH sued Holley alleging misappropriation of trade secrets.<sup>165</sup> To assert a successful claim, the trade secret owner must prove that its trade secret was misappropriated according to Georgia’s definition of trade secret and misappropriation.<sup>166</sup> The court held that here, the customer list could be considered a trade secret, and Holley’s taking of the list for an improper use could be considered a misappropriation.<sup>167</sup> According to the court, because he signed an agreement promising to keep customer lists confidential, there was enough evidence to “create a genuine issue of material fact as to whether Holley misappropriated trade secrets.”<sup>168</sup> Accordingly, the Georgia Court of Appeals affirmed the lower court’s denial of summary judgment in favor of the former employee.<sup>169</sup>

The Georgia Court of Appeals has noted that “[w]hether a particular type of information constitutes a trade secret is a question of fact.”<sup>170</sup> For example, in *Insight Technology, Inc. v. FreightCheck, LLC*,<sup>171</sup> the court held that a jury could find that accounting software specifically used for the factoring company, Insight Technology, could be considered a trade secret.<sup>172</sup> When Darren Brewer began working for Insight, he signed an employment agreement promising to keep Insight’s trade secrets confidential.<sup>173</sup> During his employment, Brewer developed the company’s website, “drafted forms, [and] designed procedures.”<sup>174</sup>

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163. *Id.* at 593, 644 S.E.2d at 865 (emphasis omitted).

164. *Id.* at 597, 644 S.E.2d at 867.

165. *Id.* at 591, 644 S.E.2d at 864.

166. *Id.* at 597, 644 S.E.2d at 867.

167. *Id.*

168. *Id.*

169. *Id.* at 598, 644 S.E.2d at 868.

170. *Insight Tech., Inc. v. FreightCheck, LLC*, 280 Ga. App. 19, 27, 633 S.E.2d 373, 380 (2006) (quoting *Camp Creek Hospitality Inns v. Sheraton Franchise Corp.*, 139 F.3d 1396, 1410-11 (11th Cir. 1998)).

171. 280 Ga. App. 19, 633 S.E.2d 373 (2006).

172. *Id.* at 27, 633 S.E.2d at 380.

173. *Id.* at 20, 633 S.E.2d at 375.

174. *Id.*

Brewer also created FactorPlus, an accounting software program specifically designed for factoring companies. While employed with Insight, Brewer and Patrick Hull started their own factoring company, FreightCheck, which used the same FactorPlus software and appeared virtually identical to Insight's website. Brewer purposely concealed his activity until Insight discovered his secret from an employee whom Brewer solicited to train FreightCheck employees.<sup>175</sup> Thereafter, Insight sued Brewer for misappropriation of trade secrets, specifically the FactorPlus software. The lower court granted Brewer's motion for summary judgment, concluding that the software could not be considered a trade secret under O.C.G.A. section 10-1-761.<sup>176</sup>

However, the Georgia Court of Appeals reversed the lower court's holding and, without much explanation, held that there was enough evidence for a jury to conclude the FactorPlus software constituted a trade secret under O.C.G.A. section 10-1-761.<sup>177</sup> Additionally, the court held that there was supporting evidence that Brewer misappropriated FactorPlus because his actions were in direct conflict with his confidentiality agreement with Insight.<sup>178</sup> Accordingly, the court held that summary judgment in favor of Brewer was inappropriate.<sup>179</sup>

#### IV. CONCLUSION

Although labor and employment issues derived from Georgia law are often not as complex as their federal counterparts, the issues arising under state law are becoming more challenging with each passing year. Adding to this challenge is the growing overlap between state and federal issues. Regardless of whether a practitioner professes to specialize in state, federal, administrative, trial, or other matters pertaining to labor and employment law, it is important to recognize that any single law or legal proceeding can, and does, impact other relations between employers and employees.

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175. *Id.* at 21-22, 633 S.E.2d at 375-77.

176. *Id.* at 19, 633 S.E.2d at 375; O.C.G.A. § 10-1-761.

177. *Insight Technology, Inc.*, 280 Ga. App. at 27-28, 633 S.E.2d at 380-81.

178. *Id.*

179. *Id.*