

"Blue-pencil" Bill Clears House Panel

Initial discussions at House Judiciary show wide support for resolution to let judges alter noncompete agreements

A proposal to streamline Georgia's muddled case law on noncompete agreements and to let judges alter disputed employment contracts that contain such agreements has received initial approval from a legislative committee.

House Resolution 178 passed the House Judiciary Committee on a voice vote on Thursday. It sets out which employees can sign contracts that include restrictive covenants, which types of covenants can be included in contracts and how courts should evaluate covenants. It would also allow judges to modify, or "blue-pencil", restrictive covenants that are too broad instead of declaring them completely unenforceable. Instead, judges would be able to rewrite an agreement to reflect its original intent, according to supporters of the bill.

However, the proposal still has a long way to go to become law: it must pass the full House and the full Senate, be signed by Gov. Sonny Perdue and receive approval from voters in a ballot referendum this fall.

Initial discussions in the House suggest there is widespread support for the proposal. Several attorneys spoke in favor of the measure during a Tuesday committee hearing, while none spoke against it. "We're looking to protect [companies'] investment of a substantial amount of funds in a key individual executive," said Rep. Wendell K. Willard, R-Sandy Springs, chairman of the House Judiciary Committee.

In 1991, the state Supreme Court struck down as unconstitutional the Georgia code section related to restrictive covenants, O.C.G.A. § 13-8-2. The high court said in *Jackson & Coker v. Hart*, 261 Ga. 371, that the Legislature exceeded its authority by approving certain types of employment contracts that would reduce competition.

In that statute's place has emerged a "thicket" of case law, according to Seyfarth Shaw partner Erika C. Birg, who has addressed legislative study committees on the topic in the past year.

Streamlining state law on restrictive covenants has the support of the Georgia Chamber of Commerce and other business groups, said **Joshua B. Belinfante**, a lawyer with **RobbinsLaw** who is representing the Georgia Chamber. Belinfante told the House Judiciary Committee on Tuesday that while he was executive counsel to Perdue, the chief executive officer of a Georgia company told the governor that the state's law on non-compete agreements "is what keeps me up at night".

"He said that he was always worried that an executive could leave and there was nothing he could do about it," Belinfante said. Other corporate executives echoed that concern to Perdue, Belinfante said, emphasizing that the loss of an executive who held key trade secrets about the company's assets or maintained critical

relationships with customers or vendors could have a significant negative effect on their companies.

Attorney **Richard L. Robbins** of RobbinsLaw, who said he has drafted and litigated hundreds of covenant issues in contracts, said that the current body of law makes it difficult to provide clear advice to clients.

"I tell clients that I will try to draft a covenant that's enforceable, but I can't ensure that it will be," Robbins said in Tuesday's committee hearing. "That's an awkward thing to say to a client."

Arnall Golden Gregory partner Andrew B. Flake spoke in favor of the legislation during Tuesday's hearing, but he acknowledged that some people have criticized the legislation for not sweeping away the entirety of Georgia's existing case law on noncompete agreements. "Courts will be applying this statute with a view to the existing case law," Flake said. "Those cases won't be set to the side, nor should they."

In addition to employment agreements between companies and key executives, the legislation would also apply to agreements between manufacturers and distributors, franchisors and franchisees and other types of business partnerships.

Sen. William S. Cowser, R-Athens, is expected to carry the legislation in the Senate, Belinfante said. Ford & Harrison employment litigator Jeffrey D. Mokotoff told the Daily Report last month that he opposed the measure, saying Georgia's "well-developed case law" makes the state's law on restrictive covenants predictable, providing freedom to employees who want to change jobs and to companies who want to hire new talent. Mokotoff said Wednesday that he continues to think the legislation is a bad idea. However, Mokotoff said he's not planning to actively oppose it.