

## GEORGIA

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### Introduction

This summary of Georgia Labor and Employment Law covers state law governing the employment relationship, including both at-will employment as well as written and oral employment agreements. *See* Sections I–V. Next, it provides a summary of several tort law topics within the employment law context, such as defamation, emotional distress claims, privacy rights, and workplace safety. *See* Sections VI–X. Georgia law on restrictive covenants and non-competition agreements, which underwent a major upheaval in 2011, is also included. *See* Section XI. Section XII briefly covers state drug testing laws. Latter sections of this summary explain employee rights and benefits provided under Georgia law, including state anti-discrimination statutes, state leave laws, and state wage and hour laws. *See* Sections XIII–XV. Finally, Section XVI sets forth several miscellaneous state statutes not covered in earlier sections that govern employment practices in the State of Georgia.

#### **I. AT-WILL EMPLOYMENT**

##### A. Statute

Georgia is an employment at-will state. Employment may be terminated at any time for any reason with or without notice. “An indefinite hiring may be terminated at will by either party.” O.C.G.A. § 34-7-1.

##### B. Case Law

“[I]n the absence of a controlling contract, ‘permanent employment,’ ‘employment for life,’ or ‘employment until retirement’ is employment for an indefinite period, terminable at the will of either party, which gives rise to no cause of action against the employer for alleged wrongful termination.” *Georgia Power Co. v. Busbin*, 250 S.E.2d 442, 443-44, 242 Ga. 612, 613 (1978); *see also Balmer v. Elan Corp.*, 599 S.E.2d 158, 278 Ga. 227 (2004); *Parker v. Crider*

*Poultry, Inc.*, 565 S.E.2d 797, 275 Ga. 361 (2002); *Anderberg v. Ga. Elec. Membership Corp.*, 332 S.E.2d 326, 175 Ga. App. 14 (1985).

An employment contract containing no definite term of employment is terminable at the will of either party, and will not support a cause of action for wrongful termination. *Balmer v. Elan Corp.*, 599 S.E.2d 158, 278 Ga. 227 (2004); *Dong v. Sheppard Cmty. Blood Ctr.*, 522 S.E.2d 720, 240 Ga. App. 137 (1999); *Hopkins v. Garner & Glover Co.*, 504 S.E.2d 78, 233 Ga. App. 264 (1998); *Jackson v. Nationwide Credit, Inc.*, 426 S.E.2d 630, 206 Ga. App. 810 (1992); see also *Wheeling v. Ring Radio Co.*, 444 S.E.2d 144, 213 Ga. App. 210 (1994); *Burton v. John Thurmond Constr. Co.*, 410 S.E.2d 137, 201 Ga. App. 10 (1991).

“An employee hired at will and without contract cannot bring an action against his employer for wrongful discharge, as the employer with or without cause and regardless of its motives may discharge the employee without liability.” *Ekokotu v. Pizza Hut, Inc.*, 422 S.E.2d 903, 905, 205 Ga. App. 534, 536-37 (1992); see also *Reilly v. Alcan Aluminum Corp.*, 528 S.E.2d 238, 272 Ga. 279 (2000) (holding that, pursuant to O.C.G.A. § 34-7-1, an at-will employee generally may be terminated for any reason, and the employee may not recover from the employer in tort for wrongful discharge); *Tidikis v. Network for Med. Commc’ns & Research, LLC*, 619 S.E.2d 481, 484, 274 Ga. App. 807 (2005) (discussing general principle and holding that because employee could be terminated under employment contract without cause, employee’s “situation is analogous to that of an at-will employee”).

Employees with employment agreements of indefinite duration cannot successfully raise a wrongful termination claim, but can pursue a claim for breach of contract if the employer had agreed to give notice of termination but did not. *Parker v. Crider Poultry, Inc.*, 565 S.E.2d 797, 275 Ga. 361 (2002); see also *Tidikis v. Network for Med. Commc’ns & Research, LLC*, 619 S.E.2d 481, 274 Ga. App. 807 (2005) (holding that because employee could be terminated under employment contract without cause, employee’s “situation is analogous to that of an at-will employee”).

An employee who is hired as part of a settlement agreement which does not specify a term of employment is an at-will employee and the relationship can be terminated by either party for any reason. *Jenkins v. Ga. Dep’t of Corrs.*, 630 S.E.2d 654, 279 Ga. App. 160 (2006).

An employer may alter the conditions of employment where the employment is terminable at will. *Transkey, Inc. v. Adkinson*, 484 S.E.2d 30, 225 Ga. App. 457 (1997).

## **II. EXCEPTIONS TO AT-WILL EMPLOYMENT**

### **A. Implied Contracts**

Oral or written employer promises are insufficient to overcome the presumption of at-will employment unless the alleged contract specifies a definite period of employment. *Lane v. K-Mart Corp.*, 378 S.E.2d 136, 190 Ga. App. 113 (1989); see also *Balmer v. Elan Corp.*, 599

S.E.2d 158, 278 Ga. 227 (2004) (holding that employer's promise not to terminate an at-will employee for specified conduct is not actionable as breach of contract, because at-will relationship not modified by the oral promise).

Reference to a two year waiting period for bonus eligibility in a letter agreement between employer and employee does not create a definite period of employment. *Hanne v. Miss. Mgmt., Inc.*, 564 S.E.2d 557, 255 Ga. App. 143 (2002).

## 1. Employee Handbooks/Personnel Materials

An employee handbook will not support an action for wrongful discharge absent language specifying duration of the employment term. *Wofford v. Glynn Brunswick Mem'l Hosp.*, 864 F.2d 117 (11th Cir. 1989); *see also Ellison v. DeKalb Cnty.*, 511 S.E.2d 284, 236 Ga. App. 185 (1999) (holding that employee manual setting forth certain policies and information concerning employment is not necessarily viewed as a contract). Georgia courts have routinely held that a policy manual is not a contract governing the length of employment. However, an employee handbook may be considered a contract of employment for purposes of *benefits* (but generally not for other purposes). For example, a plan offering severance pay, which an employee impliedly accepted by remaining employed, is an enforceable contract. *Fletcher v. Amax, Inc.*, 288 S.E.2d 49, 160 Ga. App. 692 (1981), *aff'd* 305 S.E.2d 601, 166 Ga. App. 789 (1983).

Even an at-will employee may have certain enforceable rights created by policies of an employee handbook. *Dodd v. City of Gainesville*, 551 S.E.2d 62, 250 Ga. App. 722 (2001). An employee is entitled to those earned benefits promised in his employee handbook. *Fulton-DeKalb Hosp. Auth. v. Metzger*, 417 S.E.2d 163, 203 Ga. App. 595 (1992) (finding that handbook contained no disclaimer to the contrary); *see also Shannon v. Huntley's Jiffy Stores, Inc.*, 329 S.E.2d 208, 174 Ga. App. 125 (1985); *Fletcher v. Amax, Inc.*, 288 S.E.2d 49, 160 Ga. App. 692 (1981).

Although *Metzger* holds that a handbook may create a contract for earned benefits, it does *not* stand for the broad proposition that a handbook creates a contract of employment, provided the handbook does not contain a specific term of employment. *Jackson v. Nationwide Credit, Inc.*, 426 S.E.2d 630, 206 Ga. App. 810 (1992).

Employees of government agencies that rely on their funding from the state legislature, however, may not be entitled to future benefits promised in an employment handbook. *Johnson v. Fulton Cnty.*, 509 S.E.2d 355, 235 Ga. App. 277 (1998) (holding that employee handbook cannot bind future county authorities to approve annual salary increases); *Int'l Bhd. of Police Officers Local No. 471 v. Chatham Cnty.*, 502 S.E.2d 341, 232 Ga. App. 507 (1998) (holding that state general assembly cannot pledge the good faith and credit of the state into the future).

An employee handbook that promises reinstatement and back pay if an employee is cleared of charges against him may give rise to a mutual expectation of continued employment

absent misconduct. *Baxter v. Fulton-DeKalb Hosp. Auth.*, 764 F. Supp. 1510 (N.D. Ga. 1991).

## 2. Provisions Regarding Fair Treatment

Georgia law has no provision for fair treatment in the employment setting.

## 3. Disclaimers

An employer distributing an employee handbook should include a conspicuous disclaimer on a separate piece of paper which clearly and expressly states that the handbook and its contents do not constitute an employment contract. The disclaimer should also state that the employee's employment is at the will of either party and may be terminated at any time and for any cause or no cause whatsoever. The employee should sign the disclaimer and give it to the employer. 7 Ga. Jur., Employment and Labor § 5:17; *see also Fulton-DeKalb Hosp. Auth. v. Metzger*, 417 S.E.2d 163, 203 Ga. App. 595 (1992).

An employer wishing to impose eligibility requirements on certain employee benefits outlined in the employee handbook may provide only a summary of the policies so long as it informs employees that the handbook contains only summaries and where they can consult the actual policy. *Amoco Fabrics & Fibers Co. v. Ray*, 510 S.E.2d 591, 235 Ga. App. 821 (1998).

## 4. Implied Covenants of Good Faith and Fair Dealing

As with any other contract, Georgia law imposes on each party a covenant of good faith and fair dealing in the performance and completion of their duties under a written contract for employment. *Physician Specialists in Anesthesia, P.C. v. MacNeill*, 539 S.E.2d 216, 246 Ga. App. 398 (2000) (holding that the implied duty of good faith and fair dealing "requires both parties to a contract to perform their promises and provide such cooperation as is required for the other party's performance"); *Phillips v. Key Servs. Inc.*, 510 S.E.2d 304, 235 Ga. App. 564 (1998); *Toncee, Inc. v. Thomas*, 466 S.E.2d 27, 219 Ga. App. 539 (1995); *Bldg. Materials Wholesale, Inc. v. Reeves*, 433 S.E.2d 346, 209 Ga. App. 361 (1993); *see also* O.C.G.A. § 13-4-20. For example, the court in *Phillips* found that a former employee created a jury question regarding bad faith termination under his employment contract where the Board of Directors who made the termination decision may have been motivated by a buy-back agreement allowing them to buy back the employee's shares at a lower price if the termination was for cause. The former employee's cause of action was based on the alleged lack of good faith on the part of the Board in making the decision to terminate.

In *ServiceMaster Co., L.P. v. Martin*, 556 S.E.2d 517, 252 Ga. App. 751 (2001), the court noted that the duty of good faith and fair dealing is implied in every contract and that, where these implied duties are based solely on a written employment contract, a plaintiff's cause of action for violation of these duties cannot sound in tort.

However, a claim for breach of the implied covenant of good faith and fair dealing will

be foreclosed if not tied to a specific contract provision. *Tart v. IMV Energy Sys. of Am., Inc.*, 374 F. Supp. 2d 1172 (N.D. Ga. 2005). The implied covenant is not an independent contract term. “It is a doctrine that modifies the meaning of all explicit terms in a contract, preventing a breach of those explicit terms *de facto* when performance is maintained *de jure*. But it is not an undertaking that can be breached apart from those terms.” *Alan’s of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1429 (11th Cir. 1990) (emphasis in original).

## 5. Public Employees

Courts have recognized an exception to the at-will employment doctrine where the employee is employed by a public entity and can only be terminated for just cause. *Doss v. City of Savannah*, 660 S.E.2d 457, 461, 290 Ga. App. 670, 674 (2008); *cf.* cases where the court managed to find the employment remained terminable at-will. *Wilson v. City of Sardis*, 590 S.E.2d 383, 264 Ga. App. 178 (2003) (noting that plaintiff’s employment with city was undisputedly “at will” and finding that plaintiff could not pursue wrongful termination claim); *DeClue v. City of Clayton*, 540 S.E.2d 675, 246 Ga. App. 487 (2000) (holding that city employee could be terminated without cause even though personnel manual allowed for discipline in only certain circumstances because manual expressly stated that it did not create a property interest and that employment with the city was at-will); *Dixon v. Metro. Atlanta Rapid Transit Auth.*, 529 S.E.2d 398, 242 Ga. App. 262 (2000) (holding that grievance procedures in collective bargaining agreement were not evidence of just cause termination requirement because grievance procedures created after-the-fact mechanism for seeking reinstatement); *Robins Fed. Credit Union v. Brand*, 507 S.E.2d 185, 234 Ga. App. 519 (1998).

### B. Public Policy Exceptions

#### 1. General

Georgia courts will not create public policy exceptions to the rule that employment relationships are terminable at will. What constitutes public policy is left to the legislature. *Robins Fed. Credit Union v. Brand*, 507 S.E.2d 185, 234 Ga. App. 519 (1998) (finding no exceptions to termination at will even when termination is alleged to have been in retaliation for legitimate employee conduct); *Jellico v. Effingham Cnty.*, 471 S.E.2d 36, 221 Ga. App. 252 (1996). The public policy of Georgia is clear and unambiguous that, absent a definite term of employment, an employment contract is terminable at will and a definite term of employment cannot be inferred, read in when absent, or supplied by a rule of construction when missing outside the statute, because “there is no room for this exception in Georgia as this rule is statutory and the statute . . . does not encompass the exception.” *Schuck v. Blue Cross & Blue Shield of Ga., Inc.*, 534 S.E.2d 533, 244 Ga. App. 147 (2000); *see also Ga. Farm Bureau Mut. Ins. Co. v. Croley*, 588 S.E.2d 840, 263 Ga. App. 659 (2003) (reaffirming *Schuck*).

Although there can be public policy exceptions to the at-will employment doctrine, judicially created exceptions are not favored, and state courts instead generally defer to the legislature to create them. *See Johnson v. Shoney’s, Inc.*, No. 7:04-CV-68HL, 2005 WL

2007236 (M.D. Ga. Aug. 18, 2005) (holding that it is not within the judiciary's purview to create public policy exceptions to Georgia's at-will employment law); *Balmer v. Elan Corp.*, 599 S.E.2d 158, 278 Ga. 227 (2004) (declining to judicially create "freedom to contract" as a public policy exception); *Eckhardt v. Yerkes Reg'l Primate Ctr.*, 561 S.E.2d 164, 254 Ga. App. 38 (2002) (declining to judicially create whistleblower public policy exception to employment-at-will doctrine); *Reilly v. Alcan Aluminum Corp.*, 528 S.E.2d 238, 272 Ga. 279 (2000); *Mattox v. Yellow Freight Sys., Inc.*, 534 S.E.2d 561, 243 Ga. App. 894 (2000) (declining to create judicial exception to employment-at-will doctrine where First Offender statute created no statutory cause of action).

## 2. Exercising a Legal Right

The Georgia Court of Appeals refused to adopt a public policy exception to an employer's right to discharge an at-will employee when the right is exercised in retaliation for the employee's assertion of his rights under the Georgia Workers' Compensation Act. *Evans v. Bibb Cnty.*, 342 S.E.2d 484, 178 Ga. App. 139 (1986).

An employer may not discipline or terminate a health care worker who refuses to participate in an abortion procedure, provided moral or religious objections are made in writing. O.C.G.A. § 16-12-142.

An employer may not discharge an employee because the employee makes a complaint under the Sex Discrimination in Employment Act, O.C.G.A. § 34-5-3(c), or the Equal Employment for the Handicapped Act, O.C.G.A. § 34-6A-5.

An employer may not discharge an employee because the employee was absent from employment for the purpose of attending a judicial proceeding in response to a subpoena, summons for jury duty, or other court order or process which requires the attendance of the employee at the judicial proceeding, so long as the employee gives reasonable notice of his absence and is not charged with a crime. O.C.G.A. § 34-1-3(a), (c).

An employer may not discharge an employee as a result of garnishment for any one indebtedness. O.C.G.A. § 18-4-5.

## 3. Refusing to Violate the Law

A state employer may not retaliate against a state employee who opposes a practice made unlawful by the Fair Employment Practice Act of 1978. O.C.G.A. § 45-19-44(a)(2).

## 4. Exposing Illegal Activity (Whistleblowers)

A state employer may not retaliate against state employees for whistleblowing; *i.e.*, making a complaint to their public employer about fraud, waste, or abuse in state programs and operations. O.C.G.A. § 45-1-4(d); *see also Eckhardt v. Yerkes Reg'l Primate Ctr.*, 561 S.E.2d

164, 254 Ga. App. 38 (2002) (declining to judicially create whistleblower public policy exception to employment-at-will doctrine).

### III. CONSTRUCTIVE DISCHARGE

The Georgia Legislature has not created a constructive discharge exception to its at-will employment statute, and the courts have not shown a willingness to create such an exception. *See generally Jellico v. Effingham Cnty.*, 471 S.E.2d 36, 221 Ga. App. 252 (1996); *Johnson v. Gen. Motors Corp.*, 241 S.E.2d 30, 144 Ga. App. 305 (1977); *Wilkinson v. Trust Co. of Ga. Assocs.*, 197 S.E.2d 146, 128 Ga. App. 473 (1973).

### IV. WRITTEN AGREEMENTS

#### A. Standard “For Cause” Termination

Where a written employment contract does not define “good cause,” it is the duty of the terminating party to employ good faith to determine what constitutes good cause for termination. *Phillips v. Key Servs., Inc.*, 510 S.E.2d 304, 235 Ga. App. 564 (1998); *Toncee, Inc. v. Thomas*, 466 S.E.2d 27, 219 Ga. App. 539 (1995). In *Thomas*, the jury determined that the former employee was not terminated for good cause based on evidence that he did not defectively or deficiently perform his employment duties or obligations.

At least one court has found that the employer terminated the employee in bad faith in breach of his employment contract and awarded the employee his expenses of litigation as a result. *Bldg. Materials Wholesale, Inc. v. Reeves*, 433 S.E.2d 346, 209 Ga. App. 361 (1993). In *Reeves*, the court rejected the employer’s reason for termination, that the plaintiff persisted in making excessive personal phone calls after being warned to stop, where there was evidence that the employee offered to compensate the company for the expense and time by offering to pay for the charges and working late.

Broadly worded “for cause” standards can be enforceable. In *Suwanne Pediatrics, LLC v. Fan*, 618 S.E.2d 3, 274 Ga. App. 456 (2005), the court noted that the terms under which Fan could be terminated were broad and that Fan’s actions fell within the breadth of the “for cause” termination standard in her employment contract. Thus, Fan’s termination was upheld. *Id.* (“The language of the contract permitted Dr. Odusina to take the action that she did.”).

Procedural breaches of employment agreements will not void an otherwise valid termination under the terms of the agreement. *Botterbusch v. Preussag Int’l Steel Corp.*, 609 S.E.2d 141, 271 Ga. App. 190 (2004) (holding that employer’s failure to afford notice period for termination did not void termination of employee, did not entitle the employee to recover the full value of his employment contract and, because employee suffered no actual damages was entitled to nominal damages for breach of contract only).

#### B. Status of Arbitration Clauses

1. Georgia Arbitration Code, O.C.G.A. § 9-9-1 *et seq.*

The Georgia Arbitration Code applies to all disputes in which the parties have agreed in writing to arbitrate. O.C.G.A. § 9-9-2(c). Arbitration provisions in employment contracts are valid only if the arbitration clause is initialed by all signatories at the same time the employment contract is executed. O.C.G.A. § 9-9-2(c)(9). Such a written and initialed agreement “is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award.” O.C.G.A. § 9-9-3; *see also Columbus Anesthesia Group, P.C. v. Kutzner*, 459 S.E.2d 422, 218 Ga. App. 51 (1995) (finding arbitration clause unenforceable in employment agreement between doctor and Georgia professional corporation because the clause had not been initialed).

However, the initialing requirements do not apply where the contract is between an employer and an independent contractor. For the purposes of O.C.G.A. § 9-9-2(c)(9), the independent contractor is not an “employee” and the agreement reached between the independent contractor and the employer is not an employment contract. *Joja Partners, LLC v. Abrams Props., Inc.*, 585 S.E.2d 168, 262 Ga. App. 209 (2003).

Additionally, where the arbitration clause is invalid, and the agreement is supported by a legal promise to do a number of things, the arbitration clause’s invalidity may not void the entire agreement even in the absence of a severability clause. *ISS Int’l Serv. Sys., Inc. v. Widmer*, 589 S.E.2d 820, 264 Ga. App. 55 (2003) (holding that employment agreement was severable because it was founded on multiple promises regardless of whether the agreement contained a severability clause). The general rule is that “where an agreement consists of a single promise, based on a single consideration, if either is illegal, the whole contract is void. But where the agreement is founded on a legal consideration containing a promise to do several things . . . and only some of the promises are illegal, the promises which are not illegal will be held to be valid.” *Id.*

If the transaction out of which the arbitration claim arose involves interstate commerce, then the Federal Arbitration Act (“FAA”) may control and “state law and policy must yield to federal law.” *Primerica Fin. Servs., Inc. v. Wise*, 456 S.E.2d 631, 217 Ga. App. 36, 37 (1995) (holding that FAA pre-empted Georgia’s initialing requirements for arbitration clauses in employment contracts because parties specifically acknowledged in independent contractor agreement that they were engaged in interstate commerce). *But see Southwire Co. v. Am. Arbitration Ass’n*, 545 S.E.2d 681, 248 Ga. App. 226 (2001) (finding that Georgia arbitration law applied because of the choice-of-law provision governing “validity, interpretation and enforcement” of the contract at issue); *Columbus Anesthesia Group, P.C. v. Kutzner*, 459 S.E.2d 422, 218 Ga. App. 51 (1995) (holding that Georgia’s initialing requirements in employment contract not pre-empted by FAA because contract did not involve interstate commerce).

If an arbitrable claim is subject to the statute of limitations, a party may apply to the court to stay arbitration or to vacate the award as provided in the Arbitration Act. The court has

discretion in deciding whether to apply the bar. A party waives the right to raise the statute of limitations as a bar to arbitration in an application to stay arbitration by that party's participation in the arbitration. O.C.G.A. § 9-9-5.

If the parties go forward with arbitration they may present pleadings, documents, testimony and other evidence and may cross-examine witnesses. Either a court appointed arbitrator or an arbitrator agreed upon in the arbitration agreement will conduct the hearing and make the award. Upon application of the parties the court may vacate, modify or confirm the award.

## 2. Georgia Equal Pay Law

Under the Georgia Equal Pay law, which prohibits sex discrimination in pay, both the employer and employee have the right to request arbitration of any dispute covered by that law. O.C.G.A. § 34-5-6.

## V. ORAL AGREEMENTS

For an oral assurance of continued employment to form an enforceable employment contract, the assurance must either specify that the employer will terminate the employee only for just cause or specify that the employment is for a definite duration. *Barker v. CTC Sales Corp.*, 406 S.E.2d 88, 199 Ga. App. 742 (1991); *see also Balmer v. Elan Corp.*, 599 S.E.2d 158, 278 Ga. 227 (2004); *Ford Clinic, Inc. v. Potter*, 540 S.E.2d 275, 246 Ga. App. 320 (2000) (holding that an oral promise concerning an employment contract for an indefinite period of time is not enforceable). Further, the oral agreement must be sufficiently definite as to all material terms in order to be enforceable. *Massih v. Mulling*, 610 S.E.2d 657, 271 Ga. App. 685 (2005).

An employer's alleged oral promise at hiring that an at-will employee would be promoted to director of sales without waiting the customary one year period if he met his sales quota merely implied additional compensation, and thus was not enforceable by the at-will employee. "Oral promises as to future events are not enforceable by at will employees . . . and cannot provide grounds for a breach of contract claim." *Moore v. BellSouth Mobility, Inc.*, 534 S.E.2d 133, 135, 243 Ga. App. 674, 676 (2000). However, an at-will employee does have a cause of action for breach of contract for unpaid compensation based on an oral promise where the employee is seeking compensation for work already performed. *Walker Elec. Co. v. Byrd*, 635 S.E.2d 819, 281 Ga. App. 190 (2006).

If there is an alleged oral agreement and a written employment contract, the oral agreement combines with the written contract to form one contract. The written contract prevails if the oral agreement varies or contradicts the written contract terms. If the oral agreement does not contradict the written contract terms, then the terms of the oral agreement may be pleaded and proved. *Schwartz v. Harris Waste Mgmt. Grp., Inc.*, 516 S.E.2d 371, 237 Ga. App. 656 (1999). However, where there is a merger clause in the written agreement, and the subject of the oral agreement is discussed prior to signing the written agreement, any claim based on oral

agreement is barred. *Kuehn v. Selton & Assocs., Inc.*, 530 S.E.2d 787, 242 Ga. App. 662 (2000).

A. Promissory Estoppel

An employee's detrimental reliance on oral assurances that are insufficiently specific to alter the at-will employment fails to give them contractual effect. *Balmer v. Elan Corp.*, 599 S.E.2d 158, 278 Ga. 227 (2004); *Simpson Consulting, Inc. v. Barclays Bank PLC*, 490 S.E.2d 184, 227 Ga. App. 648 (1997) (overruled on other grounds) (providing comprehensive overview of promissory estoppel under Georgia law). The following kinds of oral assurances are insufficiently definite to alter the at-will employment relationship and form contracts:

Promise to reinstate the employee to her position, *White v. I.T.T.*, 718 F.2d 994 (11th Cir. 1983); promise that the employer would alter the terms of the employee's written contract which contained a no oral modifications clause, *Gerdes v. Russell Rowe Commc'ns, Inc.*, 502 S.E.2d 352, 232 Ga. App. 534 (1998); promise that the employee would remain employed until the company became insolvent, *Barker v. CTC Sales Corp.*, 406 S.E.2d 88, 199 Ga. App. 742 (1991); Promise that the employee will be employed "for the rest of [his] working life," *Ely v. Stratoflex, Inc.*, 208 S.E.2d 583, 132 Ga. App. 569 (1974); promise that the employee would be employed for "lifetime," which meant "until death or retirement," *Land v. Delta Air Lines, Inc.*, 203 S.E.2d 316, 130 Ga. App. 231 (1973).

B. Fraud

In the few cases where plaintiffs have asserted fraud claims against their employers, the claims have failed when the issue involved alleged just cause termination. In *White v. I.T.T.*, 718 F.2d 994 (11th Cir. 1983), the Court of Appeals for the Eleventh Circuit held that, under Georgia law, a claim of fraud could not be predicated on an unenforceable promise of job security. The plaintiff contended that the employer failed to adhere to its promise to reinstate her to her position following her return from maternity leave. The court held that the promise failed to form a just cause employment contract and "[u]nder Georgia law, if a promise is unenforceable it cannot form the basis of a fraud claim." *Id.* at 997; *see also Jenkins v. Ga. Dept. of Corrs.*, 630 S.E.2d 654, 279 Ga. App. 160 (2006) (same); *Johnson v. Univ. Health Servs., Inc.*, 161 F.3d 1334 (11th Cir. 1998) (same); *Longnecker v. Ore Sorters (N. Am.), Inc.*, 634 F. Supp. 1077 (N.D. Ga. 1986) (same); *Phillips v. Liberty T.V. Cable, Inc.*, 304 S.E.2d 516, 166 Ga. App. 411 (1983) (same).

Fraud claims arise in contexts other than termination. In *Georgia-Pacific Corp. v. Lieberam*, 959 F.2d 901 (11th Cir. 1992), the employee claimed that he was fraudulently induced to sign an invention agreement, thus forfeiting his alleged right to a condenser-system he invented. The court affirmed that the employer made no false misrepresentations by requiring that the employee sign the invention agreement as a prerequisite to his employment with the company. *Id.* At least one Georgia court has found that a jury question was presented on the issue of fraudulent inducement where the plaintiff alleged that the defendant's false statements induced him to leave his former employer. Evidence supported finding that the defendant

employer had misrepresented the existence of an executed agreement with a client in order to induce the plaintiff employee to leave his job. *Plane v. Uniforce MIS Servs. of Ga., Inc.*, 503 S.E.2d 621, 232 Ga. App. 757 (1998).

Fraud does not have to be committed solely by willful misrepresentation. It “‘is subtle and can be accomplished in an infinite number of ways including signs and tricks and even, in some instances, by silence.’” *E-Z Serve Convenience Stores, Inc. v. Crowell*, 535 S.E.2d 16, 19, 244 Ga. App. 43, 45 (2000), citing *Stanford v. Otto Niederer & Sons, Inc.*, 341 S.E.2d 892, 178 Ga. App. 56 (1986).

An employee cannot recover under a fraud theory where the employee questioned his supervisor about his job performance and the supervisor, knowing that the employee would soon be fired, remained silent. The employee argued that the employer had committed fraud predicated on a promise made with present intention not to perform, however, as the underlying employment contract was terminable at will, any implied promise of continued employment was unenforceable. *Kirkland v. Pioneer Mach., Inc.*, 534 S.E.2d 435, 243 Ga. App. 694 (2000); see also *Tart v. IMV Energy Sys. of Am., Inc.*, 374 F. Supp. 2d 1172 (N.D. Ga. 2005) (noting at-will employment exception and further noting that employee cannot sustain a claim for fraudulent inducement on the basis of misrepresentations regarding the Company’s future financial commitments); *Edwards v. Cent. Ga. HHS, Inc.*, 558 S.E.2d 815, 253 Ga. App. 304 (2002) (holding that at-will employee could not maintain fraud claim based on employer’s promise to pay future bonus and relying on *Kirkland* in affirming summary judgment in favor of employer).

However, where fraud is based on existing facts, a cause of action can arise. *Tart v. IMV Energy Sys. of Am., Inc.*, 374 F. Supp. 2d 1172 (N.D. Ga. 2005).

Employee cannot use reliance on unenforceable promises in the context of at-will employment as the basis for a fraud claim. *Cramp v. Ga.-Pac. Corp.*, 596 S.E.2d 212, 266 Ga. App. 38 (2004) (holding that employee’s fraud claim with respect to alleged misrepresentation as to nature of job was untenable). If the dispute arises in the context of an employment agreement, the employee has affirmed the agreement, and the contract contains a merger clause, “the merger clause generally precludes any fraud action for oral misrepresentations not included in the agreement.” *Reichman v. S. Ear, Nose & Throat Surgeons, P.C.*, 598 S.E.2d 12, 16, 266 Ga. App. 696, 700 (2004).

Terms of an at-will employment “contract” are generally unenforceable. *Rodriguez v. Vision Corr. Group, Inc.*, 580 S.E.2d 266, 260 Ga. App. 478 (2003) (holding that at-will employee could not pursue contract theory in her attempt to recover value of promised stock options where there was no enforceable contract for the options); see also *Hightower v. Kendall Co.*, 483 S.E.2d 294, 225 Ga. App. 71 (1997).

### C. Statute of Frauds

Any agreement that is not to be performed within one year from the making thereof must

be in writing and signed by the party to be charged therewith or some person lawfully authorized by him. O.C.G.A. § 13-5-30(5).

The statute of frauds does not apply where there has been performance on one side, accepted by the other in accordance with the contract. O.C.G.A. § 13-5-31(2).

An oral contract of employment for a term beyond one year is unenforceable under the statute of frauds. *Edwards v. Cent. Ga. HHS, Inc.*, 558 S.E.2d 815, 253 Ga. App. 304 (2002); *Golden v. Nat'l Serv. Indus.*, 435 S.E.2d 270, 210 Ga. App. 53 (1993).

Where an employment contract is for an indefinite duration, it will not fall within the statute of frauds. *Parker v. Crider Poultry, Inc.*, 565 S.E.2d 797, 275 Ga. 361 (2002).

Part performance of oral employment contracts takes such contracts out of the statute of frauds if the part performance is consistent with the presence of a contract and inconsistent with the lack of a contract. Mere entry of employment is insufficient part performance to satisfy this requirement. Also, moving one's residence and refusing another employment offer is insufficient part performance. See *O'Neal v. Home Town Bank of Villa Rica*, 514 S.E.2d 669, 237 Ga. App. 325 (1999) (holding that promotional activities were insufficient to constitute part performance of alleged employment contract); *Ikemiya v. Shibamoto Am., Inc.*, 444 S.E.2d 351, 213 Ga. App. 271 (1994) (traveling to Japan, facilitating sale of business to future employer, finding office space for future employer, referring customers and providing client list to future employer were not sufficient acts to establish part performance); *Hudson v. Venture Indus., Inc.*, 252 S.E.2d 606, 243 Ga. 116 (1979). Moreover, merely showing up for work to participate in scheduled appointments with clients is not sufficient to show part performance because these activities are not inconsistent with employment terminable at will without an express contract. *Ford Clinic, Inc. v. Potter*, 540 S.E.2d 275, 246 Ga. App. 320 (2000).

Performance of a condition precedent does not constitute partial performance of a contract sufficient to make the statute of frauds inapplicable. *Johnson v. Univ. Health Servs., Inc.*, 161 F.3d 1334 (11th Cir. 1998) (talking to another doctor affiliated with defendant about the possibility of leaving her job to start her own practice with defendant was performance of a condition precedent to an employment contract).

The nature and character of the services to be performed, the place of employment, and the amount of compensation to be paid are all essential elements of an employment contract and must be stated with sufficient definiteness. *Zager v. Brown*, 530 S.E.2d 50, 242 Ga. App. 427 (2000); *Sawyer v. Roberts*, 432 S.E.2d 610, 208 Ga. App. 870 (1993); *Farr v. Barnes Freight Lines, Inc.*, 101 S.E.2d 906, 97 Ga. App. 36 (1958).

A valid written employment contract existed between a professor and the Board of Regents based on a series of letters in which the parties exchanged mutually interdependent promises containing all the essential terms of a contract, and because a Board vote of approval was a condition of the contract's performance, not one of contract formation. *Bd. of Regents of*

*the Univ. Sys. of Ga. v. Doe*, 630 S.E.2d 85, 278 Ga. App. 878 (2006).

## VI. DEFAMATION

### A. General Rule

The law recognizes two forms of action for defamatory publications: libel, which applies to written or printed words, and slander, which concerns oral communications. *Lucas v. Cranshaw*, 659 S.E.2d 612, 289 Ga. App. 510 (2008).

Defamation is actionable only where the communication is both false and malicious. Further, the plaintiff bears the burden of proving the falsity of the communication. *See Cox Enters., Inc. v. Nix*, 560 S.E.2d 650, 274 Ga. 801 (2002).

In determining whether a statement is defamatory, a court should read and construe the publication in its entirety and in the sense in which the reader, to whom the publication is addressed, would understand it. *Hoffman-Pugh v. Ramsey*, 312 F.3d 1222 (11th Cir. 2002) (finding that allegedly defamatory statements made by an employer about a former employee were not defamatory when reviewed in the context of the entire publication); *see also Wolf v. Ramsey*, 253 F. Supp. 2d 1323 (N.D. Ga. 2003). Further, “a publisher of matter is responsible, not only for the actual words published, but for the innuendo that may arise from such words.” *Hayes Microcomputer Prods., Inc. v. Franza*, 601 S.E.2d 824, 828, 268 Ga. App. 340, 345 (2004).

Generally speaking, whether a statement is defamatory is a jury question. *Hayes Microcomputer Prods., Inc. v. Franza*, 601 S.E.2d 824, 268 Ga. App. 340 (2004).

The standard for defamation of a public figure is one of “actual malice.” In determining whether one is a public figure, one recent court noted that a police officer was a public figure because he was suing to “recover for defamatory statements concerning matters affecting his ability or qualifications to carry out the duties of his office.” *Jessup v. Rush*, 609 S.E.2d 178, 180, 271 Ga. App. 243, 245 (2005).

The Georgia Legislature has codified the common law definitions of libel and slander. O.C.G.A. § 51-5-1 *et seq.*; *see also Am. Broad. Paramount Theaters, Inc. v. Simpson*, 126 S.E.2d 873, 106 Ga. App. 230 (1962).

#### 1. Libel

“A libel is a false and malicious defamation of another, expressed in print, writing, pictures, or signs, tending to injure the reputation of the person and exposing him to public hatred, contempt, or ridicule.” O.C.G.A. § 51-5-1(a).

“The publication of the libelous matter is essential to recovery.” O.C.G.A. § 51-5-1(b).

“A libel is published as soon as it is communicated to any person other than the party libeled.” O.C.G.A. § 51-5-3.

Actions for injuries to the reputation must be brought “within one year after the right of action accrues.” O.C.G.A. § 9-3-33.

An employer may be vicariously responsible for libel produced by its employees within the scope of employment under the doctrine of *respondeat superior*. *John D. Robinson Corp. v. S. Marine & Indus. Supply Co.*, 395 S.E.2d 837, 196 Ga. App. 402 (1990); *Mulherin v. Globe Oil Co.*, 328 S.E.2d 406, 173 Ga. App. 790 (1985); *see also Swift v. S.S. Kresge Co., Inc.*, 284 S.E.2d 74, 159 Ga. App. 571 (1981).

An intra corporate communication heard by someone with authority to hear such information is not considered publication for purposes of defamation; the intent of the communicator is immaterial. *Kramer v. Kroger Co., Inc.*, 534 S.E.2d 446, 243 Ga. App. 883 (2000); *Kurtz v. Williams*, 371 S.E.2d 878, 188 Ga. App. 14 (1988).

The intra corporate exception to publication is not limited to individuals who are above the plaintiff in the organization’s hierarchy. Instead, the question is whether, because of his duty or authority, the person had reason to receive the information. *Terrell v. Holmes*, 487 S.E.2d 6, 226 Ga. App. 341 (1997); *see also Hayes Microcomputer Prods., Inc. v. Franza*, 601 S.E.2d 824, 268 Ga. App. 340 (2004) (finding that no showing was made by employer to justify sending email to all company employees stating that plaintiff was terminated for cause); *O’Neal v. Home Town Bank of Villa Rica*, 514 S.E.2d 669, 237 Ga. App. 325 (1999) (intra corporate privilege is not applicable to shareholders); *Luckey v. Gioia*, 496 S.E.2d 539, 230 Ga. App. 431 (1998) (finding independent contractor status irrelevant to application of intra corporate doctrine).

Intra corporate communications made in good faith subsequent to a public, legal, or moral duty are not actionable for defamation. *Otteni v. Hitachi Am., Ltd.*, 678 F.2d 146 (11th Cir. 1982); *see also McClesky v. The Home Depot, Inc.*, 612 S.E.2d 617, 272 Ga. App. 469 (2005); *Green v. Sun Trust Banks, Inc.*, 399 S.E.2d 712, 197 Ga. App. 804 (1990).

“[W]here a supervisor has a duty to report a matter, his report is not considered published for purposes of the tort of libel merely because it has been placed in the subject employee’s personnel file.” *Cartwright v. Wilbanks*, 541 S.E.2d 393, 396, 247 Ga. App. 187, 189 (2000); *see also Kramer v. Kroger Co.*, 534 S.E.2d 446, 243 Ga. App. 883 (2000). However, an oral publication of a written defamation, such as reading defamatory documents from a former employee’s personnel file over the phone to a third party, constitutes libel, not slander. *Garren v. Southland Corp.*, 228 S.E.2d 870, 237 Ga. 484 (1976).

## 2. Slander

Actions for injuries to the reputation must be brought “within one year after the right of

action accrues.” O.C.G.A. § 9-3-33.

Slander or oral defamation consists in:

- (1) Imputing to another a crime punishable by law;
- (2) Charging a person with having some contagious disorder or with being guilty of some debasing act which may exclude him from society;
- (3) Making charges against another in reference to his trade, office, or profession, calculated to injure him therein; or
- (4) Uttering any disparaging words productive of special damage which flows naturally therefrom.”

O.C.G.A. § 51-5-4(a).

The law infers damages for slander definitions 1 through 3 above. O.C.G.A. § 51-5-4(b).

Radio or television broadcasters or their employees may be liable for any damages for any defamatory statements when the broadcaster failed to exercise due care to prevent the publication or utterance of the statement in the broadcast. O.C.G.A. § 51-5-10.

A trial court correctly allowed a jury to consider a slander per se claim where the crimes of adultery and/or fornication were imputed to plaintiff by a caller to a radio call-in show. *Wolff v. Middlebrooks*, 568 S.E.2d 88, 256 Ga. App. 268 (2002).

Vague statements or derogatory comments do not rise to the level of slander per se when the hearer cannot reasonably conclude from what is said that the comments impute a crime upon the plaintiff. *Taylor v. Calvary Baptist Temple*, 630 S.E.2d 604, 279 Ga. App. 71 (2006) (school’s statements to students to “be safe,” that former teacher had been terminated “for a reason,” and not to take former teacher’s SAT prep course did not impute the crime of child molestation, thus not slander per se). Summary judgment is properly granted on a claim of slander per se where the words at issue, concerning plaintiff’s future intentions to work in a particular geographic area, were “not recognizable as injurious on their face and [did] not, on their face, cast aspersions on [plaintiff’s] reputation because of the particular demands or qualifications of his profession.” *Bellemead, LLC v. Stoker*, 631 S.E.2d 693, 696, 280 Ga. 635, 639 (2006).

The rule of intra corporate communications *does* extend to slander actions. *Terrell v. Holmes*, 487 S.E.2d 6, 226 Ga. App. 341 (1997). *But see Zielinski v. Clorox Co.*, 450 S.E.2d 222, 215 Ga. App. 97 (1994) (holding that general announcement of theft investigation to employees “without a duty and authority to control or have knowledge” constituted publication).

The doctrine of respondeat superior is *not* extended to slander actions in Georgia. *Galardi v. Steele-Inman*, 597 S.E.2d 571, 266 Ga. App. 515 (2004); *Kramer v. Kroger Co., Inc.*, 534 S.E.2d 446, 243 Ga. App. 883 (2000); *Smith v. Trust Co. Bank*, 450 S.E.2d 866, 215 Ga. App.

413 (1994); *see also Sires v. Luke*, 544 F. Supp. 1155, 1159 (S.D. Ga. 1982); *Ga. Power Co. v. Busbin*, 250 S.E.2d 442, 242 Ga. 612 (1978).

It must be alleged and shown that the employer “expressly ordered or directed” the employee to speak the words in question before the employer can be held vicariously liable. *Sires v. Luke*, 544 F. Supp. 1155, 1159 (S.D. Ga. 1982); *Galardi v. Steele-Inman*, 597 S.E.2d 571, 266 Ga. App. 515 (2004); *Tronitec, Inc. v. Shealy*, 547 S.E.2d 749, 249 Ga. App. 442 (2001) (overruled on other grounds); *Kramer v. Kroger Co.*, 534 S.E.2d 446, 243 Ga. App. 883 (2000); *Ray v. Am. Legion Auxiliary*, 481 S.E.2d 266, 224 Ga. App. 565 (1997); *Fly v. Kroger*, 432 S.E.2d 664, 209 Ga. App. 75 (1993).

While an employer is not liable for unauthorized and unratified slander by one of its agents, the employer may be liable for tortious misconduct when a customer on the premises for a business purpose is subjected to abusive, opprobrious, insulting, or slanderous language by an agent of the employer. *Carter v. Willowrun Condo. Assoc., Inc.*, 345 S.E.2d 924, 179 Ga. App. 257 (1986). *See also Sires v. Luke*, 544 F. Supp. 1155 (S.D. Ga. 1982); *Ga. Power Co. v. Busbin*, 250 S.E.2d 442, 242 Ga. 612 (1978).

#### B. References

Statements made about a current or former employee by the current or former employer to a prospective employer have qualified privilege status because the prospective employer has a legitimate interest in the information. *Kenney v. Gilmore*, 393 S.E.2d 472, 195 Ga. App. 407 (1990); *see also Land v. Delta Airlines, Inc.*, 250 S.E.2d 188, 147 Ga. App. 738 (1978). However, if the reference statements are made with malice or ill will toward the plaintiff employee, the defendant employer loses its qualified privilege.

No set of procedures guarantees immunity from lawsuits. One Georgia case tells the story of an employer who was sued (albeit unsuccessfully) for responding to an employment verification with merely the dates of employment and the position held, although inaccurately stating the position held. *Hughes v. Rhodes*, 141 S.E.2d 841, 111 Ga. App. 389 (1965).

#### C. Privileges

The Georgia Code lists nine examples of privileged communications:

- (1) Statements made in good faith in the performance of a public duty;
- (2) Statements made in good faith in the performance of a legal or moral private duty;
- (3) Statements made with a good faith intent on the part of the speaker to protect his or her interest in a matter in which it is concerned;

- (4) Statements made in good faith as part of an act in furtherance of the right of speech or the right to petition government for a redress of grievances under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern, as defined in subsection (c) of Code Section 9-11-11.1;
- (5) Fair and honest reports of the proceedings of legislative or judicial bodies;
- (6) Fair and honest reports of court proceedings;
- (7) Comments of counsel, fairly made, on the circumstances of a case in which he or she is involved and on the conduct of the parties in connection therewith;
- (8) Truthful reports of information received from any arresting officer or police authorities; and
- (9) Comments upon the acts of public men or public women in their public capacity and with reference thereto.

O.C.G.A. § 51-5-7.

The privilege defense is not perfected unless the employer can show good faith, an interest to be upheld, a statement properly limited in its scope, a proper occasion, and publication to proper persons. *McClesky v. The Home Depot, Inc.*, 612 S.E.2d 617, 272 Ga. App. 469 (2005) (upholding employer's disclosure of reasons for plaintiff's termination to plaintiff's co-worker where co-worker and plaintiff were friends and co-worker inquired about plaintiff's termination); *Rabun v. McCoy*, 615 S.E.2d 131, 273 Ga. App. 311 (2005)(overruled on other grounds); *Cooper-Bridges v. Ingle*, 601 S.E.2d 445, 268 Ga. App. 73 (2004); *Dominy v. Shumpert*, 510 S.E.2d 81, 235 Ga. App. 500 (1998); *Baskin v. Rogers*, 493 S.E.2d 728, 229 Ga. App. 250 (1997). Proof that the defendant acted with actual malice in making the statement will defeat the privilege defense. *Rabun v. McCoy*, 615 S.E.2d 131, 273 Ga. App. 311 (2005); *see also Harkins v. Atlanta Humane Soc'y*, 618 S.E.2d 16, 273 Ga. App. 489 (2005) (“[S]tatements made by Harkins to WSB-TV were privileged. All of Harkin's statements were related to the policies and procedures of AHS and involved issues of public concern. Harkins, a long-time animal rights activist, made her statements in good faith, believing that her efforts could ‘influence or persuade government officials and the public at large to help change the problems’ at AHS.”).

“All charges, allegations, and averments contained in regular pleadings filed in a court of competent jurisdiction, which are pertinent and material to the relief sought, whether legally sufficient to obtain it or not, are privileged. However false and malicious such charges, allegations, and averments may be, they shall not be deemed libelous.” O.C.G.A. § 51-5-8. The absolute privilege afforded by this provision has been broadly construed to cover lis pendens, an affidavit in support of an arrest warrant, and the words of a judge in the course of a judicial

proceeding. But the privilege has not been extended to publishing contents of official court documents outside the judicial process. *O’Neal v. Home Town Bank of Villa Rica*, 514 S.E.2d 669, 237 Ga. App. 325 (1999); *see also Skoglund v. Durham*, 502 S.E.2d 814, 233 Ga. App. 158 (1998) (finding that statements made in connection with “Request for Investigation” filed with Georgia Real Estate Commission were absolutely privileged).

Communications made in connection with the employment security law (for unemployment compensation benefits) are absolutely privileged. O.C.G.A. § 34-8-122(a); *Doss v. City of Savannah*, 660 S.E.2d 457, 290 Ga. App. 670 (2008); *Desmond v. Troncalli Mitsubishi*, 532 S.E.2d 463, 243 Ga. App. 71 (2000); *Davis v. Copelan*, 452 S.E.2d 194, 215 Ga. App. 754 (1994). Similarly, defamatory information uncovered in the course of job performance investigations conducted by the employer may be considered privileged. *Williams v. Cook*, 386 S.E.2d 665, 192 Ga. App. 811 (1989); *see also Ass’n Servs., Inc. v. Smith*, 549 S.E.2d 454, 249 Ga. App. 629 (2001) (holding that report and videotape made in furtherance of workers’ compensation claim investigation were privileged communications). Communications to the Georgia Department of Labor for the purpose of reporting an employee’s termination are absolutely privileged. *Shannon v. Office Max N. Am., Inc.*, 662 S.E.2d 885, 291 Ga. App. 834 (2008).

Hospital administrators and other authorized persons are immune from civil or criminal liability for disclosure of the denial, restriction, or revocation of medical staff privileges when the information is distributed only to employees with a need to know the information. O.C.G.A. § 31-7-8(d).

Doctors are protected from liability for defamation when reports are made to internal medical peer review committees. O.C.G.A. § 31-7-133.

Employers who disclose information concerning an employee’s or former employee’s (a) job performance, or (b) any act committed by such employee which would constitute a violation of the laws of Georgia if such act occurred in Georgia, or (c) ability or lack of ability to carry out the duties of such job is presumed to be acting in good faith. The information may only be disclosed upon request of a prospective employer or the person seeking employment. Lack of good faith must be shown by a preponderance of the evidence, unless the information was disclosed in violation of a nondisclosure agreement or the information disclosed was otherwise considered confidential according to applicable federal, state, or local statute, rule, or regulation. O.C.G.A. § 34-1-4.

#### D. Other Defenses

##### 1. Truth

Truth is always a defense to defamation. “The truth of the charge made may always be proved in justification of an alleged libel or slander.” O.C.G.A. § 51-5-6. Thus, an unfavorable employment reference, if true, will not support a claim for defamation. *Hickson Corp. v. N.*

*Crossarm Co.*, 357 F.3d 1256 (11th Cir. 2004); *Wrenn v. Ledbetter*, 697 F. Supp. 483, 487 (N.D. Ga. 1988), *aff'd* 880 F.2d 420 (11th Cir. 1989); *Nelson v. Glynn-Brunswick Hosp. Auth.*, 571 S.E.2d 557, 257 Ga. App. 571 (2002).

## 2. No Publication

Defamation is not actionable unless the defamatory communication is published to a third party. *Shannon v. Office Max N. Am., Inc.*, 662 S.E.2d 885, 291 Ga. App. 834 (2008); *Luckey v. Gioia*, 496 S.E.2d 539, 230 Ga. App. 431 (1998); *Fly v. Kroger*, 432 S.E.2d 664, 209 Ga. App. 75 (1993); *ITT Rayonier, Inc. v. McLaney*, 420 S.E.2d 610, 204 Ga. App. 762 (1992); *Elder v. Cardoso*, 421 S.E.2d 753, 205 Ga. App. 144 (1992), *Kurtz v. Williams*, 371 S.E.2d 878, 188 Ga. App. 14 (1988). *See supra* discussion on intra corporate communication doctrine. Further, for publication to occur, the third party must understand the communication. *Sigmon v. Womack*, 279 S.E.2d 254, 158 Ga. App. 47 (1981).

## 3. Self-publication

Georgia courts reject the concept of self-publication, finding it insufficient to satisfy the publication element of defamation. Thus, an employer is not liable for making defamatory comments to the employee alone if it is the employee who later communicates the defamatory matters to third persons, including prospective employers. *Sigmon v. Womack*, 279 S.E.2d 254, 158 Ga. App. 47 (1981); *see also Bass v. Colonial Baking Co.*, 279 S.E.2d 538, 158 Ga. App. 232 (1981) (holding that it is not slander for employee to tell his coworkers the reason for his termination). *But see Colonial Stores, Inc. v. Barrett*, 38 S.E.2d 306, 73 Ga. App. 839 (1946).

## 4. Invited Libel

If an employee requests or consents to the presence of a third party and then solicits the publication of a matter which he knows or has reasonable cause to suspect will be unfavorable to him, the employee cannot then complain of defamation. Such action by the employee is considered “invited” defamation and is not actionable in Georgia. *Turnage v. Kasper*, 704 S.E.2d 842, 307 Ga. App. 172 (2010); *Terrell v. Holmes*, 487 S.E.2d 6, 226 Ga. App. 341 (1997); *Stone v. Brooks*, 322 S.E.2d 728, 253 Ga. 565 (1984); *Sophianopoulos v. McCormick*, 385 S.E.2d 682, 192 Ga. App. 583 (1989).

## 5. Opinion

Statements which are expressions of opinion cannot form the basis of a defamation action. *Fuhrman v. EDS Nanston, Inc.*, 483 S.E.2d 648, 225 Ga. App. 190 (1997) (finding that statements concerning plaintiff’s professional ability were not defamatory because they were statements of personal opinion); *Kendrick v. Jaeger*, 436 S.E.2d 92, 210 Ga. App. 376 (1993).

However, Georgia courts have been clear to reject the opinion defense as applied to alleged statements that imply an assertion of objective fact. “The pivotal questions are whether

the challenged statements can reasonably be interpreted as stating or implying defamatory facts about plaintiff and, if so, whether the defamatory assertions are capable of being proved false.” *Lucas v. Cranshaw*, 659 S.E.2d 612, 616, 289 Ga.App. 510, 514 (2008) (citations omitted) (internal quotation marks omitted); *Harcrow v. Struhar*, 511 S.E.2d 545, 236 Ga. App. 403 (1999); *Lively v. McDaniel*, 522 S.E.2d 711, 240 Ga. App. 132 (1999) (rejecting opinion defense as statement that former employee had taken valuable documents is provably false); *John D. Robinson Corp. v. S. Marine & Indus. Supply Co.*, 395 S.E.2d 837, 196 Ga. App. 402 (1990) (holding that statements went far beyond merely expressing an opinion).

#### E. Job References and Blacklisting Statutes

The only Georgia statute to address blacklisting states that the Commissioner of Labor has the power, jurisdiction, and authority to do all in his power to avoid blacklisting. O.C.G.A. § 34-2-6(5).

See § VI.B., *supra*, for a discussion on job references.

#### F. Non-Disparagement Clauses

A defamation cause of action and the applicable defenses are distinguishable from a cause of action arising from the breach of a non-disparagement clause contained in an employment contract. In *Eichelkraut v. Camp*, 513 S.E.2d 267, 236 Ga. App. 721 (1999), the non-disparagement clause prohibited both “disparaging or defamatory remarks or comments.” *Id.* at 269, 236 Ga. App. at 723. Whether the statements were true or not was irrelevant to a determination of whether the statements were disparaging. *Id.* In addition, the court noted that the privileges outlined in O.C.G.A. § 51-5-7 were not available. *Eichelkraut*, 513 S.E.2d at 269, 236 Ga. App. at 724.

### VII. EMOTIONAL DISTRESS CLAIMS

#### A. Intentional Infliction of Emotional Distress

To recover for intentional infliction of emotional distress, the plaintiff must show: “1) that defendant’s behavior was [willful] and wanton or intentionally directed to harming plaintiff; 2) that the actions of defendant were such as would naturally humiliate, embarrass, frighten, or outrage plaintiff; 3) that the conduct caused mental suffering or wounded feelings or emotional upset or distress to plaintiff.” *Coleman v. Hous. Auth. of Americus*, 381 S.E.2d 303, 306, 191 Ga. App. 166, 170 (1989); *see also Odem v. Pace Acad.*, 510 S.E.2d 326, 235 Ga. App. 648 (1998); *Amstadter v. Liberty Healthcare Corp.*, 503 S.E.2d 877, 233 Ga. App. 240 (1998). Stated another way, the tort of intentional infliction of emotional distress requires (1) intentional or reckless conduct; (2) which is extreme and outrageous; (3) a causal connection between the wrongful conduct and the emotional distress; and (4) severe emotional distress. *Johnson v. Allen*, 613 S.E.2d 657, 272 Ga. App. 861 (2005) (employer, or employee potentially acting on employer’s behalf, installed video monitoring equipment in women’s restroom); *see also*

*Johnson v. Shoney's, Inc.*, No. 7:04-CV-68HL, 2005 WL 2007236 (M.D. Ga. August 18, 2005); *Lewis v. Northside Hosp., Inc.*, 599 S.E.2d 267, 267 Ga. App. 288 (2004); *Everett v. Goodloe*, 602 S.E.2d 284, 268 Ga. App. 536 (2004); *Nicholson v. Windham*, 571 S.E.2d 466, 257 Ga. App. 429 (2002). All elements of an intentional infliction of emotional distress claim must be met to be successful. *Johnson v. Shoney's, Inc.*, No. 7:04-CV-68HL, 2005 WL 2007236 (M.D. Ga. Aug. 18, 2005).

#### 1. Outrageous and Extreme Conduct

Typically, whether conduct is sufficiently outrageous and/or extreme is the main issue involved in analyzing intentional infliction of emotional distress claims. In Georgia, the tort of intentional infliction of emotional distress has been recognized only in very limited instances. *Stamps v. Ford Motor Co.*, 650 F. Supp. 390, 401 (N.D. Ga. 1986). To prevail upon such a claim, the plaintiff must show the requisite level of egregious or outrageous behavior which justifiably results in severe fright, humiliation, embarrassment, or outrage which no reasonable person should be expected to endure. *Lightning v. Roadway Express, Inc.*, 60 F.3d 1551, 1558 (11th Cir. 1995); *Everett v. Goodloe*, 602 S.E.2d 284, 268 Ga. App. 536 (2004); *Kornegay v. Mundy*, 379 S.E.2d 14, 190 Ga. App. 433 (1989); *Moses v. Prudential Ins. Co. of Am.*, 369 S.E.2d 541, 187 Ga. App. 222 (1988).

Such conduct must be “so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Everett v. Goodloe*, 602 S.E.2d 284, 292, 268 Ga. App. 536, 545 (2004) (citations omitted) (internal quotation marks omitted); *Turnbull v. Northside Hosp. Inc.*, 470 S.E.2d 464, 220 Ga. App. 883 (1996), quoting *Yarbrough v. SAS Sys., Inc.*, 419 S.E.2d 507, 204 Ga. App. 428 (1992); see also *Hodor v. GTE Mobilnet, Inc.*, 535 S.E.2d 300, 244 Ga. App. 297 (2000). In other words, “the distress must be such that ‘no reasonable person could be expected to endure it.’” *Johnson v. Shoney's, Inc.*, No. 7:04-CV-68HL, 2005 WL 2007236 (M.D. Ga. Aug. 18, 2005).

Such conduct does not include “mere insults, indignities, threats, annoyances, petty oppressions, or other vicissitudes of daily living.” *Hodor v. GTE Mobilnet, Inc.*, 535 S.E.2d 300, 302 244 Ga. App. 297, 299 (2000) (citations omitted) (internal quotation marks omitted). “[T]he acts of the defendant must be particularly outrageous so that defendant’s misdeed approaches ordinary assault,” and must amount to “egregious, physically intimidating conduct.” *Young v. Colonial Oil Co.*, 451 F. Supp. 360, 361 (M.D. Ga. 1978); see also *Odem v. Pace Acad.*, 510 S.E.2d 326, 235 Ga. App. 648 (1998) (finding that plaintiff failed to present evidence of any severe emotional distress where he sought no professional advice from doctors or counselors and discussed matter informally with minister). “[A]lleged tasteless and rude social conduct is not actionable and there is no occasion for the law to intervene in every case where someone’s feelings are hurt.” *Johnson v. Allen*, 613 S.E.2d 657, 661, 272 Ga. App. 861, 866 (2005) (citations omitted) (internal quotation marks omitted) (employee installed video monitoring equipment in women’s restroom and court denied summary judgment to him because of “the highly invasive nature of the alleged tort in this case [and] the extremely private nature of the act being spied upon.”); *Everett v. Goodloe*, 602 S.E.2d 284, 268 Ga. App. 536 (2004).

“Factors showing sufficiently egregious conduct include a relationship in which one person has control over another, an actor’s awareness of a victim’s particular susceptibility, and severity of harm.” *Lewis v. Northside Hosp., Inc.*, 599 S.E.2d 267, 267 Ga. App. 288 (2004).

Outrageousness is to be determined from the totality of the circumstances. *Moses v. Prudential Ins. Co. of Am.*, 369 S.E.2d 541, 187 Ga. App. 222 (1988); *see also Ward v. Papa’s Pizza To Go, Inc.*, 907 F. Supp. 1535 (S.D. Ga. 1995).

The existence of a special relationship in which one person has control over another, as in the employer-employee relationship, may produce a character of outrageousness that otherwise might not exist. *Lightning v. Roadway Express, Inc.*, 60 F.3d 1551, 1558 (11th Cir. 1995); *Bridges v. Winn-Dixie Atlanta, Inc.*, 335 S.E.2d 445, 176 Ga. App. 227 (1985). However, breach of an employment contract—even a bad faith breach of contract—generally will not support a claim for intentional infliction of emotional distress. *Massih v. Mulling*, 610 S.E.2d 657, 271 Ga. App. 685 (2005).

The workplace, by its very nature, provides an environment more prone to such occurrences of outrageous behavior because it provides a captive victim who may fear reprisal for complaining so that the injury is exacerbated by repetition, and because it presents a hierarchy of structured relationships which cannot easily be avoided. *Coleman v. Hous. Auth. of Americus*, 381 S.E.2d 303, 191 Ga. App. 166 (1989); *see also Nicholson v. Windham*, 571 S.E.2d 466, 257 Ga. App. 429 (2002) (finding that temporary employee could go forward with emotional distress claim where employer coerced her to commit criminal conduct and then terminated her for her refusal to do so); *Miraliakbari v. Pennicooke*, 561 S.E.2d 483, 254 Ga. App. 156 (2002) (finding no emotional distress claim based on manager’s threats of termination and refusal to allow employee to leave work or call school after learning that her child had been injured).

The Eleventh Circuit, which encompasses Georgia, has held that termination of an employee for improper reasons “does not constitute the egregious kind of conduct on which a claim of intentional infliction of emotional distress can be based.” *Beck v. Interstate Brands Corp.*, 953 F.2d 1275, 1276 (11th Cir. 1992), *citing Suber v. Bulloch Cnty. Bd. of Educ.*, 722 F. Supp. 736, 744 (S.D. Ga. 1989). “‘Improper reasons’ include discriminatory ones.” *Ward v. Papa’s Pizza To Go, Inc.*, 907 F. Supp. 1535, 1540 (S.D. Ga. 1995) (citations omitted). If perceived discrimination or harassment, per se, were enough to establish a prima facie case of intentional infliction of emotional distress, such a claim would become a permanent appendage to all actions for discrimination or harassment. A cause of action for intentional infliction of emotional distress is not intended to supplement all claims of discrimination or harassment, “but only to punish for the emotional consequences of overwhelmingly appalling conduct.” *Id.* at 1541. *But see Harris v. Proctor & Gamble Cellulose Co.*, 73 F.3d 321 (11th Cir. 1996) (finding that plaintiff stated intentional infliction of emotional distress claim for workplace harassment, threats of termination, supervisory indifference, and false accusations).

The Georgia Court of Appeals has addressed an employee's intentional infliction of emotional distress claim based on alleged sexually harassing conduct. *Everett v. Goodloe*, 602 S.E.2d 284, 268 Ga. App. 536 (2004). In this case, the employer and employee had an ongoing romantic relationship; thus the employer's conduct did not rise to a sufficient level of outrageousness. *Id.* However, the court noted that "[a]bsent the continuing and complex relationship between these particular parties, we would not hesitate to find the alleged action quite sufficient to support a claim of intentional infliction of emotional distress." *Id.* at 292, 268 Ga. App. at 545 (noting plaintiff's allegations that her employer "exposed his sexual organ to her, forced her to touch him, lunged at her, grabbed her breasts, and sexually harassed her").

In finding that the plaintiff's intentional infliction of emotional distress claim survived summary judgment, one federal district court in Georgia has observed that "*Yarbray* lowered the bar for what qualifies as 'outrageous' conduct in Georgia." *Tapley v. Collins*, 41 F. Supp. 2d 1366, 1382 (S.D. Ga. 1999) *rev'd in part, on other grounds, and remanded*, 211 F.3d 1210 (11th Cir. 2000). In *Yarbray*, the plaintiff's allegations that her employer threatened that she would lose her job if she testified against the company and its retaliation by transferring her to an unsatisfactory employment situation after she testified, combined with her supervisor subjecting her to abuse, presented a jury question. *Yarbray v. S. Bell Tel. & Tel. Co.*, 409 S.E.2d 835, 261 Ga. 703 (1991).

In *Tapley*, the conduct alleged included that the defendants knowingly intercepted the plaintiff's telephone conversations and intended to misuse the private conversations to damage her professional standing. The court resolved the issue in favor of the plaintiff based on *Yarbray*, but noted that many post-*Yarbray* opinions arguably ignored the lowered threshold that it presents and opined that the case should be overruled. *Tapley v. Collins*, 41 F. Supp. 2d 1366, 1382 (S.D. Ga. 1999) *rev'd in part, on other grounds, and remanded*, 211 F.3d 1210 (11th Cir. 2000). *But see Boothe v. Henderson*, 31 F. Supp. 2d 988, 997 (S.D. Ga. 1998) (citing *Yarbray*, but finding no emotional distress claim based on single stalking allegation and that supervisor grabbed her by arm and twice berated her on telephone).

The Georgia Court of Appeals has also held that "[p]erformance evaluations are a recognized aspect of any employment and regardless of their brutal harshness do not constitute extreme and outrageous conduct" actionable for intentional infliction of emotional distress. *Jarrard v. United Parcel Serv., Inc.*, 529 S.E.2d 144, 147, 242 Ga. App. 58, 59 (2000). Moreover, "[t]he law is clear that performance evaluations critical of an employee do not fall into the outrageous category even though (i) given in crude and obscene language, (ii) done with a smirk, (iii) conducted in a belittling, rude, and condescending manner to embarrass and humiliate the employee, (iv) given at a poor time, (v) tinged with the intent to retaliate for former conflicts, and (vi) constituting a false accusation of dishonesty or lack of integrity." *Id.* at 60. Additionally, defamatory or derogatory remarks regarding an individual's employment generally do not rise to the level of extreme and outrageous conduct that would warrant recovery for intentional infliction of emotional distress. *Kramer v. Kroger Co.*, 534 S.E.2d 446, 243 Ga. App. 883 (2000).

## 2. Procedural Issues

Whether conduct rises to the requisite level of outrageousness and egregiousness is a question of law for the trial court. *Everett v. Goodloe*, 602 S.E.2d 284, 268 Ga. App. 536 (2004); *Turnbull v. Northside Hosp. Inc.*, 470 S.E.2d 464, 220 Ga. App. 883 (1996).

Summary judgment is appropriate where the alleged conduct falls short of the applicable standard. *See Kornegay v. Mundy*, 379 S.E.2d 14, 190 Ga. App. 433 (1989); *Moses v. Prudential Ins. Co. of Am.*, 369 S.E.2d 541, 187 Ga. App. 222 (1988); *Sossenko v. Michelin Tire Corp.*, 324 S.E.2d 593, 172 Ga. App. 771 (1984).

The Georgia Court of Appeals notes that it is not enough that the defendant acts with tortious or even criminal intent in order to form the basis of an intentional infliction of emotional distress claim. An employee's discharge, absent an improper racial motive, would not give rise to such a claim. This, of course, implies that termination based on an improper motive may form the basis of an emotional distress claim. *Phinazee v. Interstate Nationalease, Inc.*, 514 S.E.2d 843, 237 Ga. App. 39 (1999).

A claim for intentional infliction of emotional distress is a claim for personal injury which must be brought within two years after the cause of action accrues. O.C.G.A. § 9-3-33; *Risner v. R.L. Daniell & Assocs. P.C.*, 500 S.E.2d 634, 231 Ga. App. 750 (1998).

### B. Negligent Infliction of Emotional Distress

In Georgia, the tort of negligent infliction of emotional distress is only available where there has been physical impact. *Dodd v. City of Gainesville*, 601 S.E.2d 352, 268 Ga. App. 43 (2004); *Canberg v. City of Toccoa*, 567 S.E.2d 21, 255 Ga. App. 890 (2002); *Ryckelely v. Callaway*, 412 S.E.2d 826, 261 Ga. 828 (1992). Thus in order to satisfy the impact rule, a plaintiff must show (1) a physical impact; (2) that the impact caused physical injury; and, (3) that the physical injury was the cause of plaintiff's mental suffering or emotional distress. *Johnson v. Allen*, 613 S.E.2d 657, 272 Ga. App. 861 (2005); *Canberg v. City of Toccoa*, 567 S.E.2d 21, 255 Ga. App. 890 (2002). However, where the conduct is "malicious, wilful [sic] or wanton, recovery can be had without the necessity of" satisfying the impact rule. *Ryckelely*, 412 S.E.2d at 826, 261 Ga. at 828.

## VIII. PRIVACY RIGHTS

### A. Generally

Georgia has adopted William Prosser's definition of the four loosely related torts encompassing invasion of privacy. These are: 1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; 2) public disclosure of embarrassing private facts about the plaintiff; 3) publicity which places the plaintiff in a false light in the public eye; 4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. *Cabaniss v. Hipsley*, 151

S.E.2d 496, 500, 114 Ga. App. 367, 370 (1966); *see also Johnson v. Allen*, 613 S.E.2d 657, 272 Ga. App. 861 (2005); *Nelson v. Glynn-Brunswick Hosp. Auth.*, 571 S.E.2d 557, 257 Ga. App. 571 (2002), *citing Cabaniss*, 151 S.E.2d 496, 114 Ga. App. 367.

#### 1. Intrusion Upon the Plaintiff's Seclusion, Solitude or Private Affairs

To establish the tort of intrusion upon a plaintiff's seclusion, the intrusion must have been unreasonable and the plaintiff must have had some reasonable expectation of privacy. "The 'unreasonable intrusion' aspect of the invasion of privacy involves a prying or intrusion, which would be offensive or objectionable to a reasonable person, into a person's private concerns." *Yarbray v. S. Bell Tel. & Tel. Co.*, 409 S.E.2d 835, 261 Ga. 703 (1991); *see also Johnson v. Allen*, 613 S.E.2d 657, 272 Ga. App. 861 (2005). Thus, observing someone in a public place would not be an intrusion which would constitute an invasion of privacy because there is no reasonable expectation of privacy in such public setting. *Summers v. Bailey*, 55 F.3d 1564 (11th Cir. 1995) (applying Georgia law); *see also Johns v. Ridley*, 537 S.E.2d 746, 245 Ga. App. 710 (2000), *vacated on other grounds* (holding that alleged actions of supervisor calling employee at home about work-related matters did not rise to the level of unreasonable intrusion upon employee's seclusion or solitude and, thus, did not support employee's claim against supervisor for invasion of privacy). One does not have an expectation of privacy in an otherwise private place where that place is used for purposes other than what it was intended. *Johnson v. Allen*, 613 S.E.2d 657, 272 Ga. App. 861 (2005) (employer, or employee potentially acting on employer's behalf, installed video monitoring equipment in women's restroom).

#### 2. Public Disclosure of Private Facts about the Plaintiff

"There are at least three necessary elements for recovery under this theory: (a) the disclosure of private facts must be a public disclosure; (b) the facts disclosed to the public must be private, secluded or secret facts and not public ones; (c) the matter made public must be offensive and objectionable to a reasonable man of ordinary sensibilities under the circumstances." *Cabaniss v. Hipsley*, 151 S.E.2d 496, 501, 114 Ga. App. 367, 372 (1966).

Truth is not a defense to an invasion of privacy action for public disclosure of private facts. *Id.* As in the other privacy claims, a plaintiff may expressly or impliedly waive his right to privacy by making certain facts public on his own. *Id.*

The "right to recover under an invasion of privacy theory is restricted where matters of public interest are involved." *Tapley v. Collins*, 41 F. Supp. 2d 1366, 1376 (S.D. Ga. 1999), *rev'd in part, on other grounds, and remanded*, 211 F.3d 1210 (11th Cir. 2000), *citing Wilson v. Thurman*, 445 S.E.2d 811, 213 Ga. App. 656 (1994). Employment of public employees is generally considered a matter of public interest so that there are some additional statutory considerations when considering a privacy claim made by a public employee. *See* O.C.G.A. § 51-5-7(9); *Purvis v. Ballantine*, 487 S.E.2d 14, 226 Ga. App. 246 (1997). There are exceptions to the Public Records Act, O.C.G.A. § 50-18-70, *et seq.*, the violation of which may be the basis of a public employee's invasion of privacy claim. First, public disclosure of "[r]ecords

consisting of material obtained in investigations related to the suspension, firing, or investigation of complaints against public officers or employees until ten days after the same has been presented to the agency or an officer for action or the investigation is otherwise concluded or terminated . . .” is not proper. O.C.G.A. § 50-18-72(a)(8). Public disclosure is not required of medical or veterinary records and similar files. O.C.G.A. § 50-18-72(a)(2). Georgia’s highest court has interpreted “similar files” to forbid the disclosure “of *any* information which would invade the constitutional, statutory or common-law rights of . . . privacy.” *Napper v. Ga. Television Co.*, 356 S.E.2d 640, 652, 257 Ga. 156, 172 (1987). The public interest in obtaining information may outweigh the public employee’s privacy interest. *Fincher v. State*, 497 S.E.2d 632, 231 Ga. App. 49 (1998) (holding that public had legitimate interest in conduct, which outweighed public employee’s privacy rights regarding an investigation concerning allegations of his improper activities in workplace).

### 3. Publicity which Places the Plaintiff in a False Light in the Public Eye

To establish a claim of false light, a plaintiff must establish the existence of false publicity that depicts the plaintiff as something or someone which she is not, and show that the false light in which she was placed would be highly offensive to a reasonable person. *Ass’n Servs., Inc. v. Smith*, 549 S.E.2d 454, 249 Ga. App. 629 (2001); *see also Thomason v. Times-Journal, Inc.*, 379 S.E.2d 551, 190 Ga. App. 601 (1989).

Truth is a defense to a false light invasion of privacy action; the publication must depict the plaintiff as something or someone which she is not. *Zarach v. Atlanta Claims Ass’n*, 500 S.E.2d 1, 231 Ga. App. 685 (1998) (finding that plaintiff’s admission that it advertised to actively solicit Vietnamese patients for insurance claims business negated element of falsity necessary for false light claim); *Merz v. Prof’l Health Control of Augusta, Inc.*, 332 S.E.2d 333, 175 Ga. App. 110 (1985).

Any privilege that applies to a publication for a defamation action will also apply for a false light invasion of privacy action. *Lawton v. Ga. Television Co.*, 456 S.E.2d 274, 216 Ga. App. 768 (1995).

### 4. Waiver

An individual who reveals facts about himself to others waives his right to privacy “to whatever degree and in whatever connection [his] life has ceased to be private.” *Cabaniss v. Hipsley*, 151 S.E.2d 496, 502, 114 Ga. App. 367, 374 (1966). However, “[t]he right of privacy may be waived for one purpose and still asserted for another; it may be waived on behalf of one class and retained as against another class.” *Multimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491, 494, 212 Ga. App. 707, 709 (1994), *quoting Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 122 Ga. 190 (1905); *see also Torrance v. Morris Publ’g Group, LLC*, 636 S.E.2d 740, 281 Ga. App. 563 (2006).

## 5. Privilege

Where the cause of action for invasion of privacy requires a publication, all the privileges that apply to defamation actions apply to the invasion of privacy action. *Munoz v. Am. Lawyer Media, L.P.*, 512 S.E.2d 347, 236 Ga. App. 462 (1999); *Lawton v. Ga. Television Co.*, 456 S.E.2d 274, 216 Ga. App. 768 (1995); *Johnson v. Prime Bank*, 464 S.E.2d 24, 219 Ga. App. 29 (1995) (finding that information supplied by former employer to police pursuant to subpoena and cooperation in murder investigation did not constitute invasion of privacy); *see also Brewer v. Rogers*, 439 S.E.2d 77, 211 Ga. App. 343 (1993).

## 6. Statutes of Limitation

Actions for injury to reputation must be brought within one year of the publication allegedly causing the injury. Actions for injury to the person, such as mental distress, must be brought within two years of the event causing the injury. O.C.G.A. § 9-3-33; *see also Hudson v. Montcalm Publ'g Corp.*, 379 S.E.2d 572, 190 Ga. App. 629 (1989).

### B. New Hire Processing

#### 1. Eligibility Verification & Reporting Procedures

##### a. Georgia's Immigration Law

The "Illegal Immigration Reform and Enforcement Act" was signed into law on May 13, 2011. The Act requires Georgia employers to participate in the "federal work authorization" program, which is commonly known as E-Verify. The Act applies to both public and private employers, but the bill assigns different responsibilities to each. A public employer is "every department, agency, or instrumentality of the state or a political subdivision of the state with more than one employee." O.C.G.A. § 13-10-90(5). The bill does not define what constitutes a private employer.

There are other non-employment related provisions to the statute. Only the employment provisions are summarized herein. *See* below § XVI.B.

#### 2. Background Checks

##### a. Criminal Records

Private individuals or businesses may obtain criminal history records from the Georgia Crime Information Center or local criminal justice agencies. *See* O.C.G.A. § 35-3-34. The private entity must provide fingerprints or a signed, notarized consent of the person whose records are being requested, on a form provided by the Center. O.C.G.A. § 35-3-34(a)(1)(A). If an adverse employment decision is made, the private entity must inform the applicant or employee of all information pertinent to the decision, including that the private entity obtained a

record from the center, the specific contents of the record, and the effect the record had upon the decision. Failure to provide all such information to the person subject to the adverse action is a misdemeanor. O.C.G.A. § 35-3-34(b).

Employers should be aware of Georgia's First Offender Act which provides that for certain first offenses, upon fulfillment of the terms of probation or upon release, the defendant shall be discharged without court adjudication of guilt. O.C.G.A. § 42-8-62. The effect of the discharge is to completely exonerate the defendant of any criminal purpose and the defendant shall not be considered to have a criminal conviction. Despite this purpose, discharge under the Act may be used to disqualify a person for employment if the defendant's prosecution was for certain enumerated sexual offenses and the employment is either (1) with a school, child welfare agency, or child care provider; (2) with a nursing home or other long-term care facility; or (3) with a facility that provides services to mentally ill or mentally retarded individuals. O.C.G.A. § 42-8-63.1.

### C. Specific Issues

#### 1. Workplace Searches

If the employer's search of the employee's person, belongings, or space constitutes an "unreasonable intrusion" into the employee's expectation of privacy, the employer could face liability for invasion of privacy. *Yarbray v. S. Bell Tel. & Tel. Co.*, 409 S.E.2d 835, 261 Ga. 703 (1991). However, Georgia courts have also carefully limited the scope of the common law right of privacy and acknowledge that there are some shocks, inconveniences, and annoyances that employees have to absorb. *Id.*

##### a. *Sitton v. Print Direction, Inc.*: Limited Employee Privacy

The Georgia Court of Appeals recently decided a case involving an employee who used his personal laptop at work to access his employer's system network. *Sitton v. Print Direction, Inc.*, 718 S.E.2d 532, 312 Ga.App. 365 (2011). The employer suspected the sales employee of running a competing business (explicitly prohibited in the employee manual). The owner of the business walked into the employee's office, moved his mouse around (attached to this personal laptop), and incriminating emails appeared on screen. The owner printed those emails out as evidence and fired the employee. The fired employee sued for invasion of privacy, computer theft, and trespass. The employer countersued for breach of the duty of loyalty.

The employee lost at trial, where the court found that: 1) the employer's use of the employee's personal laptop to obtain emails was not computer theft, computer trespass, or computer invasion of privacy; 2) the employer's review of the employee's email on the employee's personal laptop was not such an unreasonable intrusion of employee's seclusion or solitude as to rise to the level of invasion of privacy; 3) the employer's retrieval of the email from the employee's personal laptop did not violate the statute forbidding unlawful eavesdropping or surveillance; 4) evidence supported the conclusion that the employee breached

his duty of loyalty to the employer; and (5) \$39,257.71 damages was supported by the evidence.

Because the employee could not show that the employer examined his computer “without authority,” the computer invasion of privacy claim based on O.C.G.A. § 16-9-93 failed. The court also found that the employer did not have the requisite intent to examine private information as required to find the employer liable under the statute. The employee had claimed that his private laptop was not subject to the employer’s computer policy. However, because the employee accessed the employer’s network and did work on that computer, the relevant policy did cover his personal computer. The policy provided that employees should not regard “electronic mail left on or transmitted over these systems” as “private or confidential.”

The employee’s unreasonable intrusion of privacy claim also failed. *See Yarbray v. S. Bell Tel. & Tel. Co.*, 409 S.E.2d 835, 261 Ga. 703 (1991). The court reasoned that even if the employer reading the employee’s email could constitute prohibited “surveillance,” it did not rise to the level of an unreasonable intrusion because the employer’s action was “reasonable in light of the situation” where he believed his employee was violating employment rules and the employee used that laptop for work emails and systems access.

#### b. Business Security and Employee Privacy Act

In 2008, the Georgia Legislature passed H.B. 89, the “Business Security and Employee Privacy Act,” codified at O.C.G.A. § 16-11-135. O.C.G.A. § 16-11-135(a) prohibits an employer from having or enforcing a policy “that has the effect of allowing such employer or its agents to search the locked privately owned vehicles of employees or invited guests on the employer’s parking lot and access thereto.” Exceptions apply to: searches by law enforcement; “any situation in which a reasonable person would believe that accessing a locked vehicle of an employee is necessary to prevent an immediate threat to human health, life or safety;” “vehicles owned or leased by an employer;” and where the employee consents to a search by “licensed private security officers for loss prevention purposes.” O.C.G.A. § 16-11-135(c).

Employer’s may not condition “employment upon any agreement by a prospective employee that prohibits an employee from entering the parking lot and access thereto when the employee’s privately owned motor vehicle contains a firearm that is locked out of sight within the trunk, glove box, or other enclosed compartment or area within such privately owned motor vehicle, provided that any applicable employees possess a Georgia weapons carry license.” O.C.G.A. § 16-11-135(b).

Neither of above provisions apply to an employer that provides “applicable employees with a secure parking area which restricts general public access through the use of a gate, security station, security officers, or other similar means which limit public access into the parking area, provided that any employer policy allowing vehicle searches upon entry shall be applicable to all vehicles entering the property and applied on a uniform and frequent basis.” O.C.G.A. § § 16-11-135(d)(1). Further, the sections do not apply to “an employee who is restricted from carrying or possessing a firearm on the employer’s premises due to a completed

or pending disciplinary action” or where “transport of a firearm on the premises of the employer is prohibited by state or federal law or regulation” or “to any area used for parking on a temporary basis.” O.C.G.A. § 16-11-135(d) (5), (6) and (8).

Finally, this statute’s effect is questionable in light of another provision in the law, which states:

“Nothing in this Code section shall restrict the rights of private property owners or persons in legal control of property through a lease, a rental agreement, a contract, or any other agreement to control access to such property. When a private property owner or person in legal control of property through a lease, a rental agreement, a contract, or any other agreement is also an employer, his or her rights as a private property owner or person in legal control of property shall govern.” O.C.G.A. § 16-11-135(k).

## 2. Electronic Monitoring

The Georgia Criminal Code prohibits eavesdropping, surveillance, or intercepting communications which invade the privacy of another person. O.C.G.A. § 16-11-62; *Tapley v. Collins*, 41 F. Supp. 2d 1366 (S.D. Ga. 1999), *rev’d in part, on other grounds, and remanded*, 211 F.3d 1210 (11th Cir. 2000) (finding that Georgia telephone privacy statutes arguably provide more privacy protections than their federal counterparts). Video surveillance is permissible for security or prevention of crime purposes even in areas where one may have a reasonable expectation of privacy. O.C.G.A. § 16-11-62. The statute permits eavesdropping and electronic surveillance where one party to the communication gives prior consent to such interception. O.C.G.A. § 16-11-66. *See also Fetty v. State*, 489 S.E.2d 813, 268 Ga. 365 (1997). In addition, this right of privacy may be waived either expressly or by implication. *Bodrey v. Cape*, 172 S.E.2d 643, 120 Ga. App. 859 (1969). Thus, an employer may condition employment on the employee’s consent to interception. When employees are advised that telephones are for business use only and that the telephones will be monitored, an employer’s monitoring of a phone call does not constitute an unreasonable intrusion into the employees’ private affairs. *Jackson v. Nationwide Credit, Inc.*, 426 S.E.2d 630, 206 Ga. App. 810 (1992). The same result extends to monitoring of work-related emails and computer activity. *Sitton v. Print Direction, Inc.*, 718 S.E.2d 532, 312 Ga. App. 365 (2011). An employer may also conduct reasonable surveillance to further its interest in defending a personal injury suit. *Ellenberg v. Pinkerton’s, Inc.*, 188 S.E.2d 911, 125 Ga. App. 648 (1972).

Surveillance which is conducted in a vicious or malicious manner or is deliberately calculated to frighten or torment the plaintiff constitutes an unreasonable intrusion upon the plaintiff’s seclusion. *Ellenberg v. Pinkerton’s Inc.*, 202 S.E.2d 701, 130 Ga. App. 254 (1973); *see also Ass’n Servs., Inc. v. Smith*, 549 S.E.2d 454, 249 Ga. App. 629 (2001) (citing *Ellenberg* and holding that whether surveillance was reasonable was a jury question and that there was evidence that, unlike in *Ellenberg*, the investigator trespassed on plaintiffs’ private property during surveillance).

Georgia courts have required that the intrusion be physical, analogous to a trespass, although this requirement has apparently been relaxed to include prying into a person's private concerns. *See Summers v. Bailey*, 55 F.3d 1564 (11th Cir. 1995). *See also Johnson v. Allen*, 613 S.E.2d 657, 272 Ga. App. 861 (2005) (employer, or employee potentially acting on employer's behalf, installed video monitoring equipment in women's restroom); *Tapley v. Collins*, 41 F. Supp. 2d 1366 (S.D. Ga. 1999), *rev'd in part on other grounds and remanded*, 211 F.3d 1210 (11th Cir. 2000) (noting open issue whether telephonic eavesdropping by use of electronic scanner constitutes physical intrusion); *Ass'n Servs., Inc. v. Smith*, 549 S.E.2d 454, 249 Ga. App. 629 (2001); *Troncalli v. Jones*, 514 S.E.2d 478, 237 Ga. App. 10 (1999).

### 3. Social Media

Georgia has not enacted any laws relating to social media in employment.

### 4. Taping of Employees

“Unlike intrusion, disclosure, or false light, appropriation does not require the invasion of something secret, secluded or private pertaining to plaintiff, nor does it involve falsity. It consists of the appropriation, for the defendant's benefit, use or advantage, of the plaintiff's name or likeness.” *Cabaniss v. Hipsley*, 151 S.E.2d 496, 114 Ga. App. 367, 377 (1966); *see also Johnson v. Allen*, 613 S.E.2d 657, 272 Ga. App. 861 (2005) (employer, or employee potentially acting on employer's behalf, installed video monitoring equipment in women's restroom); *Thomas v. Food Lion, LLC*, 570 S.E.2d 18, 256 Ga. App. 880 (2002) (holding that display of security tape to police, victim and victim's family did not benefit Food Lion and Food Lion did not receive anything of value in exchange for the display).

In order to recover under this theory, the defendant must have sold, published, or publicly displayed the plaintiff's likeness or have received something of value for the likeness. *Jarrett v. Butts*, 379 S.E.2d 583, 190 Ga. App. 703 (1989). A claim for wrongful appropriation may be brought for injury to reputation or for injury to the person. *Hudson v. Montcalm Publ'g Corp.*, 379 S.E.2d 572, 190 Ga. App. 629 (1989).

### 5. Release of Personal Information on Employees

Georgia law prohibits disclosure of the results of AIDS-virus tests, except in limited circumstances. O.C.G.A. §§ 24-12-20, 24-12-21. Georgia law generally protects physicians and pharmacists from the forced release of patient medical information. O.C.G.A. § 24-12-1. Special provisions for the very strong public policy against the unauthorized release of mental health and substance abuse treatment records exist in Georgia. O.C.G.A. § 24-5-501 (communications between psychiatrist/licensed psychologist/licensed clinical social worker, etc. and patient); O.C.G.A. § 37-3-166 (confidentiality of clinical records of mental health patients); O.C.G.A. § 37-7-166 (confidentiality of clinical records of substance abuse patients); O.C.G.A. § 43-39-16 (psychologist-patient privilege).

## 6. Medical Information

See Section VIII.C.5.

## IX. WORKPLACE SAFETY

### A. Negligent Hiring

#### 1. Generally

Georgia employers are responsible for maintaining a safe workplace and may be liable for negligent hiring or negligent retention of a dangerous employee. To recover for a negligent hiring and retention claim, a plaintiff must prove that (1) an employee was incompetent; (2) the plaintiff's injury resulted proximately from the incompetency; and (3) the employer knew, or in the exercise of ordinary care should have known, of such incompetency. *Am. Multi-Cinema, Inc. v. Walker*, 605 S.E.2d 850, 270 Ga. App. 314 (2004); *Kelley v. Baker Protective Servs., Inc.*, 401 S.E.2d 585, 198 Ga. App. 378 (1991); *Lindsey v. Winn Dixie Stores, Inc.*, 368 S.E.2d 813, 186 Ga. App. 867 (1988). The term "incompetence" may include violent or other criminal propensities. *Alpharetta First United Methodist Church v. Stewart*, 472 S.E.2d 532, 221 Ga. App. 748 (1996).

#### 2. Duty of Ordinary Care

An employer "is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency." O.C.G.A. § 34-7-20. Generally speaking, the ordinary care standard does not require an employer to investigate an employee's past before hiring. See *Worstell Parking, Inc. v. Aisida*, 442 S.E.2d 469, 212 Ga. App. 605, 606 (1994) (holding employer not liable for negligent hiring when employee, a parking attendant, struck customer while on duty; employer knew that attendant had non-violent criminal history, but did not know of his propensity towards violence); *Kemp v. Rouse-Atlanta, Inc.*, 429 S.E.2d 264, 207 Ga. App. 876 (1993) (granting summary judgment to employer where its security guard forcibly arrested the plaintiff for theft; employer did not know nor should it have known of guard's violent tendencies, and failure to train the guard properly under state regulations was not negligent, as the training was not designed to uncover latent character defects). See also *Kaiser v. Tara Ford, Inc.*, 546 S.E.2d 861, 248 Ga. App. 481 (2001) (addressing customer's negligent hiring/retention claim, which alleged that car dealership failed to properly train and supervise employee, and finding that the claim was not supported where there was no prior indication that the employee had any criminal propensities, and upon admission by the employee of her wrongdoing with respect to the customer, she was fired).

Hiring for certain kinds of employment, such as safety sensitive jobs, may require greater effort to meet the standard of care. See, e.g., *C.K. Sec. Sys., Inc. v. Hartford Accident and Indem. Co.*, 223 S.E.2d 453, 137 Ga. App. 159 (1976) (hiring security guards). But see *Kemp v. Rouse-Atlanta, Inc.*, 429 S.E.2d 264, 207 Ga. App. 876 (1993). For example, in *Piney Grove Baptist*

*Church v. Goss*, 565 S.E.2d 569, 255 Ga. App. 380 (2002), the Court noted that, prior to appointing Goss to manage the church construction site, no attempt to investigate his qualifications was made; thus, there was a material question of fact as to whether church negligently selected Goss for the job. In *Govea v. City of Norcross*, 608 S.E.2d 677, 271 Ga. App. 36 (2004), for instance, the court suggested that the defendant's failure to review a police officer applicant's personnel file with another police department could be actionable, because "a jury might conclude that Chamblee might have been alerted from [the police officer's] personnel file that his tendencies or propensities would cause personal injury to another." *Id.* at 687, 271 Ga. App. at 48.

In the health care context, this duty has given rise to a separate action: "A cause of action for negligent credentialing is an independent cause of action arising out of a health care institution's direct responsibility to its patients to take reasonable steps to ensure that medical care providers are qualified." *Wellstar Health Sys., Inc. v. Green*, 572 S.E.2d 731, 733, 258 Ga. App. 86, 88 (2002); *see also McCall v. Henry Med. Ctr., Inc.*, 551 S.E.2d 739, 250 Ga. App. 679 (2001).

### 3. Actual or Constructive Knowledge

An employer must have known, actually or constructively, of its employee's incompetency in order to be held liable for negligent hiring or negligent retention. O.C.G.A. § 34-7-23. *See, e.g., Simon v. Morehouse Sch. of Med.*, 908 F. Supp. 959 (N.D. Ga. 1995) (finding issues of fact precluded summary judgment on negligent retention claim where the employer retained a supervisor after receiving multiple complaints from the plaintiff regarding his violent harassment, and he thereafter raped her); *Dowdell v. The Krystal Co.*, 662 S.E.2d 150, 154-55, 291 Ga. App. 469, 472-73 (2008) (summary judgment granted to employer where patron of fast food restaurant failed to present any evidence that employer knew or should have known that employee that hit patron posed a reasonably foreseeable risk of harming customers); *Poole v. N. Ga. Conference of the Methodist Church, Inc.*, 615 S.E.2d 604, 273 Ga. App. 536 (2005) (holding that employer could not have known either before or during employment of pastor's propensity to commit adultery); *Am. Multi-Cinema, Inc. v. Walker*, 605 S.E.2d 850, 270 Ga. App. 314 (2004) (denying summary judgment because theater knew of similarly aggressive and inappropriate behavior in a similar situation two years prior to the case at bar); *Heard v. Mitchell's Formal Wear, Inc.*, 549 S.E.2d 149, 249 Ga. App. 492 (2001) (employee assaulted by co-employee failed to present evidence sufficient to create an issue of fact on negligent supervision claim when the only evidence of the co-employee's violent or criminal propensities was the co-employee's statement that he had thrown pens, pads, or pencils on the counter when upset), *citing Kemp v. Rouse-Atlanta*, 429 S.E.2d 264, 207 Ga. App. 876 (1993); *see also Piney Grove Baptist Church v. Goss*, 565 S.E.2d 569, 255 Ga. App. 380 (2002); *Herrin Bus. Prods., Inc. v. Ergle*, 563 S.E.2d 442, 254 Ga. App. 713 (2002). This does not mean, however, that the employer is only liable if it has knowledge of the specific act. For instance, in *Govea v. City of Norcross*, 608 S.E.2d 677, 271 Ga. App. 36 (2004), the court stated that even though the defendant may not have known that the police officer it had hired would give his service weapon to a thirteen-year-old child without supervision, this is not the standard. "[I]t is not necessary

that [it] should have contemplated or even be able to anticipate the particular consequence which ensued, or the precise injuries sustained by the plaintiff. It is sufficient if, by exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.” *Id.* (citations omitted) (internal quotation marks omitted) (defendant knew or had reason to know of police officer’s carelessness, inattentiveness and disregard for safety procedures).

#### 4. Scope of Liability

Potential plaintiffs under a theory of negligent hiring and retention include customers/clients of the employer, other employees, invitees and third party bystanders. Typically, the employer is liable for the tortious act of an employee if the tortious act is committed during working hours or under the color of employment. *Herrin Bus. Prods., Inc. v. Ergle*, 563 S.E.2d 442, 254 Ga. App. 713 (2002); *Harvey Freeman & Sons, Inc. v. Stanley*, 378 S.E.2d 857, 259 Ga. 233 (1989).

Employer liability for negligent hiring is distinct from that derived from the theory of respondeat superior. Negligence based on the hiring or retention decision of the employer allows the injured person to place liability on the employer, even where the employee’s conduct was intentional or criminal and did not occur within the scope of employment. *See, e.g., Dowdell v. The Krystal Co.*, 662 S.E.2d 150, 291 Ga. App. 469 (2008); *Rogers v. Carmike Cinemas, Inc.*, 439 S.E.2d 663, 211 Ga. App. 427 (1993); *Mountain v. S. Bell Tel. & Tel. Co.*, 421 S.E.2d 284, 205 Ga. App. 119 (1992); *Doe v. Vill. of St. Joseph, Inc.*, 415 S.E.2d 56, 202 Ga. App. 614 (1992); *Odom v. Hubeny, Inc.*, 345 S.E.2d 886, 179 Ga. App. 250 (1986); *see also* O.C.G.A. § 51-2-2; *Brown v. AMF Bowling Ctrs., Inc.*, 511 S.E.2d 619, 236 Ga. App. 277 (1999) (holding the fact that bartender was not authorized to intervene in physical altercations with the tavern’s patrons did not require finding that such intervention fell outside the scope of his employment and, thus, did not preclude the tavern owner’s liability for the patron’s injuries).

A common rationale for the negligent hiring theory is that it provides a remedy to injured third parties who would otherwise be foreclosed from recovering under the respondeat superior doctrine when the employee’s acts were outside the scope of employment. *Durben v. Am. Materials, Inc.*, 503 S.E.2d 618, 232 Ga. App. 750 (1998).

Notably, the employer is liable for the tortious acts of an employee even if the act is committed outside the scope of employment where there is a relationship between the employer and the tort victim. *TGM Ashley Lakes, Inc. v. Jennings*, 590 S.E.2d 807, 264 Ga. App. 456 (2003) (overruling *Spencer v. Gary Howard Enters.*, 568 S.E.2d 763, 256 Ga. App. 599 (2002) and *Stephens v. Greensboro Proprs.*, 544 S.E.2d 464, 247 Ga. App. 670 (2001) and holding that cases incorrectly interpreted previous case law as standing for the proposition that there can be no liability for negligent hiring and retention if the tort is committed outside the scope of employment and that liability limitations in previous case law simply shield “employers from liability for torts that their employees commit on the public in general, that is to say, people who have no relation to or association with the employer’s business.”).

Liability for a claim of negligent hiring and retention may fail, however, if the plaintiff knows of the employee's incompetency. *Strickland v. Foughner*, 12 S.E.2d 371, 63 Ga. App. 805 (1940). In a related context, employers have a duty to exercise reasonable care not to hire an employee that the employer knew or should have known posed a risk of harm to others where it is reasonably foreseeable from the employee's "tendencies" that the employee could cause the type of harm sustained by the tort victim. *Munroe v. Universal Health Servs., Inc.*, 596 S.E.2d 604, 277 Ga. 861 (2004).

## 5. Specific Cases

*Patterson v. Se. Newspapers, Inc.*, 533 S.E.2d 119, 243 Ga. App. 241 (2000). A newspaper was not liable for negligent retention of an employee in an action brought by the widow and executor of estate of a motorist killed in a collision with a newspaper employee where the newspaper had a procedure in place to check driving records of employee, there was no indication that the newspaper did not follow these procedures, and there was no evidence that the procedure would have revealed that the employee's license had been suspended eleven days prior to the accident. The newspaper was not on notice of the employee's driving violations during the employee's employment with the newspaper.

*Harper v. City of East Point*, 515 S.E.2d 623, 237 Ga. App. 375 (1999). City employer was denied summary judgment on a negligent retention claim brought by a female citizen who was sexually assaulted by a city police officer. After the city had hired this police officer, it had received a citizen's complaint about him which resulted in an investigation that uncovered three sexually inappropriate encounters between the officer and other female citizens. *But see Munroe v. Universal Health Servs., Inc.*, 596 S.E.2d 604, 277 Ga. 861 (2004) (disapproving of *Harper's* "restrictive and inflexible" foreseeability standard and holding that a plaintiff must show that the employer knew or should have known about tendencies or propensities of the wrongdoer that "could cause the type of harm sustained by the plaintiff").

*New Madison S. Ltd. P'ship v. Gardner*, 499 S.E.2d 133, 231 Ga. App. 730 (1998). Courtesy officer for apartment complex was pursuing personal business and was not acting within the scope of his employment when he shot the plaintiff resident off the premises of the complex, the night after the officer and the plaintiff had exchanged heated words when the officer had asked the plaintiff to turn down his radio.

*Hobbs v. Principal Fin. Group, Inc.*, 497 S.E.2d 243, 230 Ga. App. 410 (1998). The employer was not liable for broker's conduct in fraudulently inducing investors to invest in a nonexistent fund which he falsely represented as the employer's fund. There was no evidence that the employer ratified the broker's acts and the acts were the broker's personal acts for his own benefit and involved no participation by, and did not benefit the employer.

*Mountain v. S. Bell Tel. & Tel. Co.*, 421 S.E.2d 284, 205 Ga. App. 119 (1992). The employer was not liable for negligent hiring and retention where its employee committed rape

while at a customer's residence to establish phone service. Although the employee had a pattern of excessive absences, work related injuries, and regularly called in sick on Monday, the employer did not know he had violent tendencies and could not foresee that absenteeism would lead to rape.

*B.C.B. Co., Inc. v. Troutman*, 409 S.E.2d 218, 200 Ga. App. 671 (1991). An employer was denied summary judgment on a negligent hiring and retention claim for sexual harassment where it had received multiple reports of harassment against the same manager in the past, but took no action except to transfer a prior complainant to a different department. The court also held, however, that failure to follow an established policy for reporting sexual harassment may serve as a defense to a claim of negligent hiring/retention by the employer.

*Lindsey v. Winn Dixie Stores, Inc.*, 368 S.E.2d 813, 186 Ga. App. 867 (1988). An employer was denied summary judgment on a negligent retention claim where its employee announced the day before he attacked a fellow employee that he was going to take his face and "mop the back room with it."

*Big Brother/Big Sister of Metro Atlanta, Inc. v. Terrell*, 359 S.E.2d 241, 183 Ga. App. 496 (1987). A non-profit organization did not negligently select a volunteer who sexually molested a minor whom he met while working with the organization. Nothing in the screening process, which included assessment by a case worker, an extensive interview, family history check and completion of a written application, revealed criminal propensities. The court held that the organization was not required to do an "FBI" check, a psychological evaluation or credit check on the volunteer.

B. Negligent Supervision/Retention

See section IX.A on negligent hiring.

C. Interplay with Workers' Compensation Bar

See Section on XVI.G.5. on workers' compensation in Georgia.

D. Firearms in the Workplace

See Section VIII.C.1.b. on firearms in the workplace.

E. Use of Mobile Devices

Georgia law has no provisions regarding use of mobile devices in the workplace.

## **X. TORT LIABILITY**

A. Respondeat Superior Liability

See Sections VI.A.1&2, IX.A.4.

B. Tortious Interference with Business/Contractual Relations

To establish a claim for tortious interference with business relations or potential business relations, one must prove:

(1) improper action or wrongful conduct by the defendant without privilege; (2) the defendant acted purposely and with malice with the intent to injure; (3) the defendant induced a breach of contractual obligations or caused a party or third parties to discontinue or fail to enter into an anticipated business relationship with the plaintiff; and (4) the defendant's tortious conduct proximately caused damage to the plaintiff.

*Blakey v. Victory Equip. Sales, Inc.*, 576 S.E.2d 288, 292, 259 Ga. App. 34, 38 (2002) (citation omitted); see also *Tidikis v. Network for Med. Commc'ns & Research, LLC*, 619 S.E.2d 481, 274 Ga. App. 807 (2005); *Perimeter Realty v. GAPI, Inc.*, 533 S.E.2d 136, 243 Ga. App. 584 (2000).

There must be a nexus between the alleged improper action and the alleged damage caused to plaintiff. *Sumter Reg'l Hosp., Inc. v. Sumter Free Press, Inc.*, 546 S.E.2d 831, 248 Ga. App. 780 (2001). Further, one must be able to prove that it suffered a financial injury. *Id.*

With regard to the first element of the tort, "improper action" has been interpreted to mean "predatory tactics such as physical violence, fraud or misrepresentation, defamation, use of confidential information, abusive civil suits, and unwarranted criminal prosecutions." *Disaster Servs., Inc. v. ERC P'ship*, 492 S.E.2d 526, 529, 228 Ga. App. 739, 741 (1997); see also *Batayias v. Kerr-McGee Corp.*, 601 S.E.2d 174, 267 Ga. App. 848 (2004) (barring employee from premises under facts presented did not constitute "improper action"). Similarly the "malice" requirement under the second element is broadly construed to encompass any unauthorized interference or any interference without legal justification or excuse. *Hayes v. Irwin*, 541 F. Supp. 397, 429 (N.D. Ga. 1982). Exercise of an absolute legal right cannot be considered interference with a contractual or potential contractual relationship. *Tidikis v. Network for Med Commc'ns & Research, LLC*, 619 S.E.2d 481, 274 Ga.App. 807 (2005) (right to terminate without cause not interference).

With regard to the third element, a plaintiff's success is conditioned on its ability to establish that another's activities induced current or potential business relations/customers to not enter or continue with a contract. To satisfy the fourth element, a plaintiff must be able to identify specific damages. *Lively v. McDaniel* 522 S.E.2d 711, 240 Ga. App. 132 (1999).

The defendant must be a "stranger to both the contract at issue and the business relationship giving rise to and underpinning the contract." *Tidikis v. Network for Med Commc'ns & Research, LLC*, 619 S.E.2d 481, 486, 274 Ga. App. 807, 812 (2005). If a defendant "has a

legitimate economic interest in either the contract or a party to the contract, then the defendant is not a stranger to the contract and acts with privilege.” *Id.* at 486, 274 Ga. App. at 812 (*citing Disaster Servs., Inc. v. ERC P’ship*, 492 S.E.2d 526, 228 Ga. App. 739 (1997)). Similarly, if the defendant has a “financial interest in one of the parties to the contract or in the contract, the defendant is not a stranger to the contract or business relationship, even though it is not a signatory to the contract.” *Id.* at 486, 274 Ga. App. at 813 (*citing Renden, Inc. v. Liberty Real Estate Ltd. P’ship III*, 444 S.E.2d 814, 213 Ga. App. 333 (1994)).

A plaintiff may recover for “aiding and abetting a breach of fiduciary duty” (also denominated as “procuring a breach of fiduciary duty” or “tortious interference with a fiduciary relationship”) by proving the following elements: “(1) through improper action or wrongful conduct and without privilege, the defendant acted to procure a breach of the primary wrongdoer’s fiduciary duty to the plaintiff; (2) with knowledge that the primary wrongdoer owed the plaintiff a fiduciary duty, the defendant acted purposely and with malice and the intent to injure; (3) the defendant’s wrongful conduct procured a breach of the primary wrongdoer’s fiduciary duty; and (4) the defendant’s tortious conduct proximately caused damage to the plaintiff.” *Insight Tech., Inc. v. FreightCheck, LLC*, 633 S.E.2d 373, 379, 280 Ga. App. 19, 25-26 (2006).

## **XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS**

### **A. General Rule**

#### **1. Passage of the Restrictive Covenants Act**

On May 11, 2011, Governor Nathan Deal signed into law Georgia’s new restrictive covenant law, H.B. 30. The new statutory scheme, found at O.C.G.A. § 13-8-50 *et seq.* and known as the Restrictive Covenants Act (“RCA”), fundamentally reformed the law governing non-solicitation, non-competition, and non-disclosure/confidentiality agreements in the state.

Nearly identical legislation, H.B. 173, was previously enacted into law in 2009. Because the Georgia Constitution prohibited agreements “defeating or lessening competition,” the 2009 statute (hereinafter the “2009 RCA”) provided that it would not become law until one day after passage of an enabling amendment to the Constitution; that is, November 3, 2010. The constitutional amendment was determined to be necessary to avoid the fate of the 1990 Restrictive Covenant Act, which was found unconstitutional by the Georgia Supreme Court in *Jackson & Coker, Inc. v. Hart*, 405 S.E.2d 253, 261 Ga. 371 (1991).

Shortly after passage (67% of voters approved the ballot measure) of the 2009 RCA, critics raised concerns over the efficacy of the ballot referendum. The Georgia Constitution provides that, in the absence of language in the resolution proposing the amendment or in the amendment itself, constitutional amendments do not take effect until January 1 of the year following ratification. 50 Ga. Const. art. X, § 1, ¶ VI. Neither the enabling amendment nor the resolution proposing the amendment contained an effective date. The chairman of the House

Judiciary Committee advised attorneys to assume the new provisions would only be binding on or after January 1, 2011. 60 Wendell K. Willard, Letter to the Editor, “Non-Compete Change Takes Effect at Beginning of ‘11,” Daily Report, Nov. 10, 2010.

Despite this, legislators proposed H.B. 30, the RCA. By passing a new bill, legislators sought complete assurance that the law would be changed. They did not, however, concede the impotence of the 2009 RCA:

During the 2009 legislative session the General Assembly enacted HB 173, which was a bill that dealt with the issue of restrictive covenants in contracts and which was contingently effective on the passage of a constitutional amendment. During the 2010 legislative session the General Assembly enacted HR 178, the constitutional amendment necessary for the statutory language of HB 173, and the voters ratified the constitutional amendment on November 2, 2010. It has been suggested by certain parties that because of the effective date provisions of HB 173, there may be some question about the validity of that legislation. It is the intention of this Act to remove any such uncertainty by substantially reenacting the substantive provisions of HB 173, but the enactment of this Act should not be taken as evidence of a legislative determination that HB 173 was in fact invalid.

H.B. 30, 151st Gen. Assem., Reg. Sess. (Ga. 2011) (internal citations omitted).

## 2. Which Law Governs?

The RCA applies only to restrictive covenants executed on or after its effective date of May 11, 2011. Prior Georgia restrictive covenant law, primarily developed through case law, will continue to apply to restrictive covenants executed on or before May 10, 2011. At one point, restrictive covenants executed between November 3, 2010, and May 10, 2011, occupied a “gray area,” which could have resulted in courts applying either the 2009 RCA or the aforementioned Georgia case law. The Eleventh Circuit ruled on this issue on June 4, 2012.

A panel of the Eleventh Circuit Court of Appeals addressed the effective date of the RCA in *Becham v. Synthes USA*, 482 Fed.Appx. 387 (11th Cir. 2012). The court had to decide what Georgia public policy applied during the time frame between November 3, 2010, and May 11, 2011, for purposes of determining whether to honor a Pennsylvania choice-of-law provision. Below, the Middle District of Georgia disregarded the Pennsylvania choice-of-law provision as enforcing it would have violated the old Georgia public policy. In its opinion, the Eleventh Circuit examined the history of the change in the law and the possible events that could have altered Georgia’s public policy. Ultimately, the panel found that Georgia’s public policy did not change until May 11, 2011. Therefore, for the Eleventh Circuit’s purposes, the Middle District of Georgia did not err in disregarding the Pennsylvania choice-of-law provision as contrary to

Georgia public policy, nor in applying Georgia law.

Because prior Georgia restrictive covenant law still controls when confronted with an older restrictive covenant, such law is summarized below in Section E.

3. Similarity of the 2009 RCA and RCA

Upon careful review, there are no significant substantive differences between the RCA and the 2009 RCA. Therefore, the latter (which was superseded by the former) is not summarized herein. [As of August 2013, Georgia courts have yet to interpret the RCA.]

4. Summary of the RCA

a. Findings of General Assembly

The General Assembly found that “reasonable restrictive covenants” protect “legitimate business interests and creat[e] an environment that is favorable to attracting commercial enterprises to Georgia and keeping existing businesses within the state.” O.C.G.A. § 13-8-50. The General Assembly found the RCA necessary to provide parties with certainty of the validity and enforceability of restrictive covenants. *Id.*

b. Restrictive Covenants only Permitted within Certain Relationships and a Note on the RCA’s Use of “Employee”

Restrictive covenants may exist within or ancillary to contracts between or among employers and employees, distributors and manufacturers, lessors and lessees, partnerships and partners, franchisors and franchisees, sellers and purchasers of a business or commercial enterprise, and two or more employers. O.C.G.A. §§ 13-8-51(15), 13-8-52(a). The RCA only applies to those contracts or agreements just described. O.C.G.A. § 13-8-52(b).

For apparent ease of drafting, the RCA uses the term “employee” to include franchisees, distributors, lessees, licensees, parties to a partnership agreement, sales agents, brokers, or representatives with connection with franchise, distributorship, lease, license, or partnership agreements. O.C.G.A. § 13-8-51(5)(D). For this reason, this Summary of the RCA uses the word “employee” in this broad sense, unless otherwise noted.

The RCA further defines “employee” to include executive employees, research and development personnel and independent contractors in possession of confidential information, and any person or entity in possession of selective or specialized skills, learning, abilities, contacts, or information by reason of having worked for an employer. O.C.G.A. § 13-8-51(5)(A)-(C).

c. Contracts Restricting Competition during the Term of the Restrictive Covenant

Contracts restricting competition *during* the term of the restrictive covenant are enforceable under the RCA so long as such restrictions are reasonable in time, geographic area, and scope of prohibited activities. O.C.G.A. § 13-8-53(a).

d. Contracts Restricting Competition after the Term of Employment – Generally

Contracts that restrict competition *after* the term of employment cannot be enforced against all types of employees (even within the RCA’s already narrow definition of “employee”). Rather, the RCA provides that such contracts may only be enforced against certain enumerated categories of employees.

For example, if the employee, in the course of his employment, customarily and regularly (1) solicits customers or prospective customers for the employer; or (2) engages in making sales or obtaining orders or contracts for products or services to be performed by others, then such an employee can sign a binding restrictive covenant. O.C.G.A. § 13-8-53(a)(1)-(2).

Similarly, if the employee has a primary duty of managing the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, customarily and regularly directs the work of two or more employees, and has the authority to hire or fire other employees or has particular weight given to suggestions and recommendations as to hiring, firing, advancement, promotion, or any other change of status of other employees, then such an employee can sign a binding restrictive covenant. O.C.G.A. § 13-8-53(a)(3).

Finally, if the employee meets either of the RCA’s definitions of a “key employee” or “professional,” then he can be bound by a restrictive covenant. O.C.G.A. § 13-8-53(a)(4). A “key employee” is generally an employee: who has gained a high level of notoriety, fame, or reputation as the employer’s representative or spokesperson; who has a high level of influence or credibility with the employer’s customers, vendors, or other business relationships; who is intimately involved in the planning for or direction of the business of the employer or a defined unit of the business; *or* who possesses selective or specialized skills, learning, abilities, or customer contacts or customer information and has developed such skills, learning, or abilities because of his work for his employer. O.C.G.A. § 13-8-51(8). Alternatively, a “professional” is an employee who performs work requiring advanced knowledge in a field requiring invention, imagination, originality, or talent. A “professional” must acquire this knowledge through study, and not on-the-job training. O.C.G.A. § 13-8-51(14).

e. Contracts Restricting Competition after the Term of Employment – Non-Solicitation

The RCA allows an employee to agree in writing to refrain, for a stated period of time following termination, from soliciting or attempting to solicit any business from any of his employer’s customers with whom the employee had “material contact” during his employment

for purposes of providing products or services that are competitive with those provided by the employer's business. O.C.G.A. § 13-8-53(b). "Material contact" is broadly defined. O.C.G.A. § 13-8-51(10).

No express reference to geographic area or to the types of products or services considered to be competitive is required in order for the restraint to be enforceable. Contractual provisions prohibiting "soliciting or attempting to solicit business from customers" or similarly broad language will be enforced but narrowly construed. O.C.G.A. § 13-8-53(b).

f. Descriptions of Activities, Products and Services, and Geographic Areas

Whenever a description of activities, products and services, or geographic areas is required by the RCA, any description that provides a fair notice of the maximum reasonable scope of the restraint will satisfy the RCA, even if the description is generalized or could possibly be stated more narrowly to exclude extraneous matters. O.C.G.A. § 13-8-53(c)(1).

In the case of a postemployment covenant entered into prior to termination, any good faith estimate of the activities, products, services, or geographic areas that may be applicable at the time of termination shall also satisfy the RCA, even if such an estimate is capable of including or ultimately proves to include extraneous activities, products, services, or geographic areas. O.C.G.A. § 13-8-53(c)(1). The postemployment covenant must be construed ultimately to cover only so much of such estimate as relates to the activities actually conducted, the products or services actually offered, or the geographic areas actually involved within a reasonable period of time prior to termination. *Id.*

Activities, products, or services shall be considered sufficiently described if a reference to the activities, products, or services is provided and qualified by the phrase "of the type conducted, authorized, offered, or provided within two years prior to termination" or similar language containing the same or a lesser time period. The phrase "the territory where the employee is working at the time of termination" or similar language will be considered sufficient as a description of geographic areas if the person or entity bound by the restraint can reasonably determine the maximum reasonable scope of the restraint at the time of termination. O.C.G.A. § 13-8-53(c)(2).

g. Presumptions

In determining the reasonableness of a restrictive covenant that limits or restricts competition during or after the term of an employment or business relationship, the court *must* make several presumptions.

First, during the term of the relationship, a time period equal to or measured by duration of the parties' business or commercial relationship is reasonable. O.C.G.A. § 13-8-56(1). In the case of a restrictive covenant sought to be enforced against a former employee and not associated

with a sale or ownership of all or a material part of a designated ownership interest, the court must presume reasonable in time any restraint two years or less in duration and presume unreasonable any restraint more than two years in duration, measured from the date of the termination of the business relationship. O.C.G.A. § 13-8-57(b)(5). In the case of a restrictive covenant sought to be enforced against the owner or seller of all or a material part of certain designated business interests, a court must presume to be reasonable in time any restraint the longer of five years or less in duration, or equal to the period of time during which payments are being made to the owner or seller as a result of any sale referred to. A court must presume to be unreasonable in time any restraint more than the longer of five years in duration or the period of time during which payments are being made, measured from the date of termination or disposition of such interest. O.C.G.A. § 13-8-57(d)(5).

Second, a geographic territory which includes the areas in which the employer does business at any time during the parties' relationship, even if not known at the time of entry into the restrictive covenant, is reasonable provided that either the total distance encompassed by the provision of the covenant also is reasonable or the agreement contains a list of particular competitors as prohibited employers for a limited period of time after the term of employment or a business or commercial relationship. O.C.G.A. § 13-8-56(2).

Third, the scope of competition restricted is measured by the business of the employer or other business or entity seeking enforcement of the restrictive covenant. O.C.G.A. § 13-8-56(3).

Fourth, any restriction that operates during the term of an employment relationship or other business relationship must not be considered unreasonable because it lacks any specific limitation upon scope of activity, duration, or geographic area so long as it promotes or protects the purpose or subject matter of the agreement or deters any potential conflict of interest. O.C.G.A. § 13-8-56(4).

#### h. Confidential Information

The RCA carves out restrictive covenants seeking the nondisclosure of confidential information from its overall scheme. O.C.G.A. § 13-8-53(e). The RCA defines confidential information as data and information, including trade secrets, methods of operation, names of customers, price lists, financial information and projections, route books, personnel data, and similar information: relating to the business of the employer, regardless of whether the data or information constitutes a trade secret; disclosed to the employee or of which the employee became aware of as a consequence of the employee's relationship with the employer; and having value to the employer, not generally known to competitors of the employer. O.C.G.A. § 13-8-51(3). The RCA further puts forth rules as to when public information can constitute confidential information. *Id.*

#### i. Pleading Requirements

The person seeking enforcement of a restrictive covenant must plead and prove the

existence of one or more legitimate business interests justifying the restrictive covenant. O.C.G.A. § 13-8-55. The RCA defines “legitimate business interest” to include: trade secrets; confidential information that otherwise does not qualify as a trade secret; substantial relationships with specific prospective or existing customers, patients, vendors, or clients; customer, patient, or client good will associated with specific enumerated factors; and extraordinary or specialized training. O.C.G.A. § 13-8-51(9).

If the person seeking enforcement of a restrictive covenant establishes by *prima facie* evidence that the restraint is in compliance with the provisions of the RCA, then any person opposing enforcement has the burden of establishing that the contractually specified restraint does not comply with such requirements or that such covenant is unreasonable. O.C.G.A. § 13-8-55.

j. Hardship to Employee

The RCA provides that, in determining the reasonableness of a restrictive covenant between an employer and employee, a court may consider the economic hardship imposed upon an employee by enforcement of the covenant. O.C.G.A. § 13-8-58(d). This subsection only applies to actual employees and not those entities the RCA considers as “employees” for ease of drafting; i.e., distributors, lessees, etc. *See* O.C.G.A. § 13-8-52(a).

k. Blue-penciling

Any restrictive covenant not in compliance with the RCA is unlawful, void, and unenforceable. Courts *may*, however, modify a restrictive covenant that is otherwise void and unenforceable so long as the modification does not render the covenant more restrictive with regard to the employee than as originally drafted by the parties. O.C.G.A. § 13-8-53(d). The modification and accompanying relief granted by the court should conform to the parties’ original intent. O.C.G.A. § 13-8-54(b).

5. Georgia Restrictive Covenant Law Prior the RCA

a. Relevance of Prior Law

As explained above, the RCA (and possibly its predecessor, the 2009 RCA) supersedes the case law that evolved over time governing restrictive covenants in Georgia. This case law is not “dead,” however, and absent a ruling from the courts indicating otherwise, will continue to govern restrictive covenants executed prior to November 3, 2010, and possibly to those restrictive covenants executed between November 3, 2010, and May 10, 2011. For that reason, the following summary should remain helpful for some time. Additionally, courts will surely look to this case law to “gap fill” the RCA and answer any questions the RCA leaves unanswered.

b. General Rule

“Because covenants against competition in employment agreements are in partial restraint of trade, they are upheld only when strictly limited, both in time and geographical effect, and when the restrictions are otherwise reasonable, considering the business interests of the employer needing protection and the effect of the restrictions on the employee.” *Sanford v. RDA Consultants, Ltd.*, 535 S.E.2d 321, 244 Ga. App. 308 (2000); *see also Fellows v. All Star, Inc.*, 612 S.E.2d 86, 272 Ga. App. 262 (2005) (noncompetition agreement which contained neither specific territorial limits nor limited restrictions to customers with whom former employees had contacts during their employment was unreasonable and unenforceable).

An employee’s contractual duty to provide a specified termination notice to the employer under an employment contract is not a restrictive covenant. *Capricorn Sys., Inc. v. Pednekar*, 546 S.E.2d 554, 248 Ga. App. 424 (2001). *But see Carvalho v. Credit Suisse Sec. (USA) LLC*, No. 1:07-CV-2612-RWS, 2007 WL 4054748 at \*2 (N.D. Ga Oct. 31, 2007).

#### c. Consideration

Consideration must be given for a covenant not to compete. *Keeley v. Cardiovascular Surgical Assocs., P.C.*, 510 S.E.2d 880, 236 Ga. App. 26 (1999). Historically, employment and continued employment have been held to be sufficient consideration for a restrictive covenant. *See Mouldings, Inc. v. Potter*, 315 F. Supp. 704, 713 (M.D. Ga. 1970); *Thomas v. Coastal Indus. Servs., Inc.*, 108 S.E.2d 328, 214 Ga. 832 (1959); *Baker v. Nat’l Credit Ass’n, Inc.*, 88 S.E.2d 19, 211 Ga. 635 (1955). However, continued employment is insufficient consideration for a restrictive covenant where the employment is not terminable at will and the employer is not entitled to terminate employment for “refusing to sign—or abide by—the noncompetition agreement.” *Glisson v. Global Sec. Servs., L.L.C.*, 653 S.E.2d 85, 87, 287 Ga. App. 640, 641 (2007). Employers may be prudent to include independent consideration in drafting a non-competition agreement given the dated case law. *See Swartz Invs., LLC v. Vion Pharm., Inc.*, 556 S.E.2d 460, 252 Ga. App. 365 (2001) (discussing level of scrutiny applied to restrictive covenant, comparing partnership agreement to employment covenants and stating “an employee generally receives no consideration separate from his employment for a restrictive covenant . . . . The lack of consideration for an employee’s restrictive covenant is an additional justification for subjecting employment agreements to heightened scrutiny.” (citations omitted) (internal quotation marks omitted)).

#### d. Scope of Restrictions

An enforceable restrictive covenant must be reasonable in (i) duration, (ii) geographical coverage, and (iii) scope of activity in the particular field of employment.

##### i. Duration

The duration of non-competition restrictions must be reasonable. *Kuehn v. Selton & Assocs., Inc.*, 530 S.E.2d 787, 242 Ga. App. 662 (2000) (finding that covenant restricting real

estate agent from conducting business with tenants who were clients of former employer as long as clients remained in leased building or project rendered the covenant unreasonable and unenforceable as the language of the covenant was unclear as to the duration of the restriction and had the potential to be effective “for decades”).

Non-competition restrictions of two-year duration have generally been upheld, but restrictions of longer duration have also been enforced. *See Mathis v. Orkin Exterminating Co.*, 562 S.E.2d 213, 254 Ga. App. 335 (2002) (two-year non-competition covenant); *Saxton v. Coastal Dialysis & Med. Clinic, Inc.*, 470 S.E.2d 252, 220 Ga. App. 805, aff’d 476 S.E.2d 587, 267 Ga. 177 (1996) (two-year covenant covering 60-mile radius of “City Hall, Savannah, Chatham County, Georgia”); *Smith v. HBT, Inc.*, 445 S.E.2d 315, 213 Ga. App. 560 (1994) (five years); *see also Augusta Eye Ctr., P.C. v. Duplessie*, 506 S.E.2d 242, 234 Ga. App. 226 (1998) (one-year covenant barring ophthalmologist from competing with former employer eye center); *Delli-Gatti v. Mansfield*, 477 S.E.2d 134, 223 Ga. App. 76 (1996) (twelve-month covenant preventing pediatrician from practicing pediatrics and other medicine generally in a single county).

Limitations are considered on a fact-by-fact basis and may be considered together with geographic, scope-of-activity or other restrictions. There is no per se outer limitation on the permissible duration of a covenant not to compete. Moreover, covenants not to compete made in conjunction with the sale of a business may be unlimited as to time, so long as the buyer remains in the business, and still be valid. *Martinez v. DaVita, Inc.*, 598 S.E.2d 334, 266 Ga. App. 723 (2004).

In recent years, Georgia courts have found tolling provisions contained in non-competition agreements enforceable. *Paul Robinson, Inc. v. Haege*, 462 S.E.2d 396, 218 Ga. App. 578 (1995) (tolling provision enforceable where it extended agreement only if its terms were challenged in court before it expired). A tolling provision, like the non-competition agreement, must be “reasonable” to be enforceable. The Georgia Supreme Court has recognized that private parties may include reasonable tolling provisions in the context of an employment contract with a non-solicitation covenant, but the court stated that it would not judicially impose a tolling provision. *Elec. Data Sys. Corp. v. Heinemann*, 493 S.E.2d 132, 268 Ga. 755 (1997). *But see Gynecologic Oncology, P.C. v. Weiser*, 443 S.E.2d 526, 212 Ga. App. 858 (1994) (non-competition agreement with provision that tolls agreement from time of violation unenforceable).

## ii. Geographic Restrictions

An employer is generally permitted to include a geographic term describing the territory in which the employee has in fact performed work, thus protecting itself from the unfair appropriation of good will and information acquired in the course of that work. In contrast, a restriction relating to a larger area in which the employer does business is generally unenforceable due to overbreadth, unless the employer can demonstrate a strong justification for such a restriction. *Dent Wizard Int’l Corp. v. Brown*, 612 S.E.2d 873, 272 Ga. App. 553 (2005) (employer failed to present strong justification for covenant containing a four-county territorial

restriction; employee only received basic training in dent removal process which was not unique and he no longer used method). *See also Gale Indus., Inc. v. O'Hearn*, 570 S.E.2d 661, 257 Ga. App. 220 (2002) (holding that 100-mile territorial radius was unenforceable given that it was not limited by customers served by employee or area in which he worked); *Capricorn Sys., Inc. v. Pednekar*, 546 S.E.2d 554, 248 Ga. App. 424 (2001) (holding that non-compete covenant prohibiting former employee from soliciting any customer of former employer anywhere that it does business, even though the former employee had no relationship with such customer or the customer's clients was overly broad and unenforceable); *Davis v. Albany Area Primary Health Care, Inc.*, 503 S.E.2d 909, 233 Ga. App. 311 (1998) (finding non-compete prohibiting physician from practicing within 20-mile air radius of any of employer's clinics unenforceable).

A geographic restriction that is not determinable until the time of the employee's termination is unreasonable as a matter of law. *BellSouth Corp. v. Forsee*, 595 S.E.2d 99, 265 Ga. App. 589 (2004); *Advance Tech. Consultants, Inc. v. RoadTrac, LLC*, 551 S.E.2d 735, 250 Ga. App. 317 (2001). *But see Watson v. Waffle House, Inc.*, 324 S.E.2d 175, 253 Ga. 671 (1985). Similarly, territorial restrictions which have the ability to change or expand during the course of the agreement are unenforceable. *New Atlanta Ear, Nose & Throat Assocs., P.C. v. Pratt*, 560 S.E.2d 268, 253 Ga. App. 681 (2002) (finding that covenant failed to list addresses and the number of offices at each area identified in the covenant; thus, sixteen-mile radius restriction could shift as offices moved or expanded in number), citing *Koger Props. v. Adams-Cates Co.*, 274 S.E.2d 329, 247 Ga. 68 (1981). Geographic limitations may be drafted using specific counties, cities or states, or by using a radius of miles around a specified area. *See, e.g., Mathis v. Orkin Exterminating Co.*, 562 S.E.2d 213, 254 Ga. App. 335 (2002) (geographic restriction for thirteen counties); *Augusta Eye Ctr., P.C. v. Duplessie*, 506 S.E.2d 242, 234 Ga. App. 226 (1998) (geographic restriction of ten specified counties not unduly excessive where employee treated patients from those areas).

The Georgia Supreme Court has stated expressly that there is not per se outside limit on the territorial restrictions that can be upheld under Georgia law. *Johnson v. Lee*, 257 S.E.2d 273, 243 Ga. 864 (1979); *see also Davis v. Albany Area Primary Health Care, Inc.*, 503 S.E.2d 909, 233 Ga. App. 311 (1998); *Harville v. Gunter*, 495 S.E.2d 862, 230 Ga. App. 198 (1998).

In the case of non-solicitation provisions, "unless the nonsolicit covenant pertains *only to those clients with whom the employee had a business relationship* during the term of the agreement, the nonsolicit covenant must contain a territorial restriction." *Trujillo v. Great S. Equip. Sales, LLC*, 657 S.E.2d 581, 584, 289 Ga. App. 474, 477 (2008) (nonsolicit provision unenforceable which contained no geographical restriction and sought to prevent solicitation of customers of employee about whom the employee had confidential or proprietary information) (citations omitted) (internal quotation marks omitted).

### iii. Scope of Activity

An enforceable non-competition agreement must specify with particularity the activity to be prohibited and the restriction must be rationally related to his employment. *See, e.g.,*

*Martinez v. DaVita, Inc.*, 598 S.E.2d 334, 266 Ga. App. 723 (2004) (restricting physician from operating a competing dialysis center was reasonable); *Mathis v. Orkin Exterminating Co.*, 562 S.E.2d 213, 254 Ga. App. 335 (2002) (prohibiting account manager from engaging in “pest control, exterminating, fumigating or termite control business in any capacity identical” to the capacity in which employed by Orkin); *Brunswick Floors, Inc. v. Guest*, 506 S.E.2d 670, 234 Ga. App. 298 (1998) (prohibiting former floor covering installer from engaging in floor covering business as individual, partner, adviser, stockholder, director, officer, clerk, principal, agent or employee too broad). In addition, some courts have stated that, in determining the legitimacy of the interest the employer seeks to protect, the court will take into account the employer’s time and monetary investment in the employee’s skills and development of his craft. *Beckman v. Cox Broad. Corp.*, 296 S.E.2d 566, 250 Ga. 127 (1982).

Georgia courts have consistently declined to enforce prohibitions stated in vague terms such as “engaging in any business similar to the employers business” or “in any capacity” language. *Am. Gen. Life & Accident Ins. Co. v. Fisher*, 430 S.E.2d 166, 208 Ga. App. 282 (1993); *see also Ken’s Stereo-Video Junction, Inc. v. Plotner*, 560 S.E.2d 708, 253 Ga. App. 811 (2002) (finding that restrictive covenant prohibiting employee from working in any capacity for any business engaged in the installation of consumer electronics was overbroad and unenforceable); *Allied Informatics, Inc. v. Yeruva*, 554 S.E.2d 550, 251 Ga. App. 404 (2001) (finding restrictive covenant unenforceable because it failed to limit the type of business employee prohibited from doing with employer’s clients).

In the case of non-solicitation provisions, it is well established that a non-solicitation provision may not contain a bar on the acceptance of business from unsolicited clients. *Pregler v. C&Z, Inc.*, 575 S.E.2d 915, 259 Ga. App. 149 (2003); *Waldeck v. Curtis 1000, Inc.*, 583 S.E.2d 266, 261 Ga. App. 590 (2003). In *Waldeck*, for example, it was unreasonable for an office supplies distributor to prohibit a former sales representative from accepting any orders from his former customers. “While a prohibition involving some *affirmative* act on the part of the former employee, such as solicitation, diversion, or contact of clients, may be reasonable, a covenant prohibiting a former employee from merely accepting business, without any solicitation, is not reasonable.” *Id.* at 268, 261 Ga. App. at 592. However, a non-solicitation clause prohibiting the solicitation of former customers for a reasonable period of time, without regard to when the former employee may have had contact with those customers during his tenure, is enforceable; “the critical factor is whether the former employee ever served the customer, not the length of time since he or she may have done so.” *Palmer & Cay of Ga., Inc. v. Lockton Cos.*, 629 S.E.2d 800, 802, 280 Ga. 479, 480 (2006).

Non-solicitation provisions which contain no geographical limitation must only limit solicitation of clients with whom the employee had a business relationship during the term of the agreement. *Trujillo v. Great S. Equip. Sales, LLC*, 657 S.E.2d 581, 584, 289 Ga. App. 474, 477 (2008) (nonsolicit provision unenforceable which contained no geographical restriction and sought to prevent solicitation of customers of employee about whom the employee had confidential or proprietary information).

Georgia courts have enforced non-competition agreements which restrict a range of activities including, but not limited to, the following:

*Wesley-Jessen, Inc. v. Armento*, 519 F. Supp. 1352 (N.D. Ga. 1981) (employer efforts in providing training and customer lists are a proper subject for non-competition restriction); *see also Edwards v. Howe Richardson Scale Co.*, 229 S.E.2d 651, 237 Ga. 818 (1976); *Mike Bajalia, Inc. v. Pike*, 172 S.E.2d 676, 226 Ga. 131 (1970).

*Lighting Galleries, Inc. v. Drummond*, 543 S.E.2d 419, 247 Ga. App. 124 (2000) (non-competition covenant between lighting company and former employee prohibiting employee from working as a residential lighting consultant was not overbroad, as covenant was tailored to job that employee performed for former employer).

*Keeley v. Cardiovascular Surgical Assocs., P.C.*, 510 S.E.2d 880, 236 Ga. App. 26 (1999) (non-compete covenant in cardiovascular surgeon's employment agreement barring him from establishing competing practice within 75 miles valid).

*Chaichimansour v. Pets Are People Too, No. 2, Inc.*, 485 S.E.2d 248, 226 Ga. App. 69 (1997) (relationships with current and potential customers may be protected by employer through non-competition agreement).

*Sunstates Refrigerated Servs. Inc. v. Griffin*, 449 S.E.2d 858, 215 Ga. App. 61 (1994) (covenant barring use, disclosure and exploitation of confidential business information is a reasonable restriction in non-competition agreement).

*Osta v. Moran*, 430 S.E.2d 837, 208 Ga. App. 544 (1993) (employer has no enforceable interest in avoiding fair competition through a non-competition agreement).

*Durham v. Stand-By Labor of Ga., Inc.*, 198 S.E.2d 145, 230 Ga. 558 (1973) (property, confidential information and relationships, good will and economic advantage can be protected in non-competition agreements).

e. Blue-Penciling

Georgia courts will not "blue-pencil" or partially enforce a non-competition agreement ancillary to employment if the covenant is overbroad in any respect. If any sub-paragraphs of the restrictive covenant are invalid, the entire covenant must fail. *Harville v. Gunter*, 495 S.E.2d 862, 230 Ga. App. 198 (1998); *Sysco Food Servs. of Atlanta, Inc. v. Chupp*, 484 S.E.2d 323, 225 Ga. App. 584 (1997); *see also Trujillo v. Great S. Equip. Sales, LLC*, 657 S.E.2d 581, 584, 289 Ga. App. 474, 477 (2008); *Pregler v. C&Z, Inc.*, 575 S.E.2d 915, 259 Ga. App. 149 (2003); *Riddle v. Geo-Hydro Eng'rs, Inc.*, 561 S.E.2d 456; 254 Ga. App. 119 (2002); *Kuehn v. Selton & Assocs., Inc.*, 530 S.E.2d 787, 242 Ga. App. 662 (2000).

In contrast, a non-competition agreement that is ancillary to the sale of a business may

generally be modified by a court if it is found to be overly broad. *See Holsapple v. Smith*, 599 S.E.2d 28, 267 Ga. App. 17 (2004), disapproved of by *Bellemead, LLC v. Stoker*, 631 S.E.2d 693, 280 Ga. 635 (2006), on other grounds (reversing judgment on pleadings on enforceability of non-competition agreement as too many issues outstanding to determine if it was part of sale or employment). For an in-depth discussion of Georgia’s approach to blue-penciling, *see generally Advance Tech. Consultants, Inc. v. RoadTrac, LLC*, 551 S.E.2d 735, 250 Ga. App. 317 (2001).

Void restrictive covenants that cannot be blue-penciled will not void otherwise valid contract provisions where the contract contains a severability clause. *Capricorn Sys., Inc. v. Pednekar*, 546 S.E.2d 554, 248 Ga. App. 424 (2001).

#### f. Confidentiality Agreements

Confidentiality agreements or nondisclosure agreements limit a former employee’s ability to use or to disclose confidential information that does not rise to the level of trade secrets - for example, information about the former employer’s operations, customers, and suppliers. *See, e.g., Lee v. Envtl. Pest & Termite Control, Inc.*, 516 S.E.2d 76, 271 Ga. 371 (1999). *See also Trujillo v. Great S. Equip. Sales, LLC*, 657 S.E.2d 581, 584, 289 Ga. App. 474, 477 (2008) (provision which sought to prevent solicitation of customers of employee about whom the employee had confidential or proprietary information not a valid confidentiality provision, but an unenforceable non-solicitation provision).

#### g. Other Considerations

##### i. Choice of Law

The Georgia conflict of law rule for contracts governs. Foreign choice of law provisions in restrictive covenants sought to be enforced in Georgia will not control where the contract is “particularly distasteful.” *Enron Capital & Trade Res. Corp. v. Pokalsky*, 490 S.E.2d 136, 227 Ga. App. 727 (1997) (holding that Georgia law, and not Texas law, would control where restrictive covenant in question contained no time limitation, was overbroad in both scope and geography). *See also Hulcher Servs., Inc. v. R.J. Corman R.R. Co.*, 543 S.E.2d 461, 247 Ga. App. 486 (2000) (holding that Georgia law, not Texas law, controlled determination of whether restrictive covenants enforceable).

##### ii. Employer Breach

In an employment contract which did not contain a severability clause and in which an employer breached the contract that included restrictive covenants, the restrictive covenants were rendered unenforceable by the employer’s breach. *See Marcre Sales Corp. v. Jetter*, 476 S.E.2d 840, 223 Ga. App. 70 (1996) (holding that employer’s violation of employment contract’s automatic renewal provision rendered restrictive covenants unenforceable).

##### iii. Burden of Proof

The party seeking to enforce the covenant has the burden of proving its reasonableness. *See, e.g., Brunswick Floors, Inc. v. Guest*, 506 S.E.2d 670, 234 Ga. App. 298 (1998).

#### iv. Level of Scrutiny

Generally, restrictive covenants that are ancillary to professional partnership agreements are viewed with a middle level of scrutiny while those found in employment contracts are subject to strict scrutiny. This is because, in part, partners usually hold relatively equal bargaining positions, while an employer's bargaining power is "markedly superior" to that of the employee. *Physician Specialists in Anesthesia, P.C. v. MacNeill*, 539 S.E.2d 216, 246 Ga. App. 398 (2000); *see also New Atlanta Ear, Nose & Throat Assocs., P.C. v. Pratt*, 560 S.E.2d 268, 253 Ga. App. 681 (2002) (holding that where there are both employment and shareholder restrictive covenants, strict scrutiny applies to employment covenants); *Riddle v. Geo-Hydro Eng'rs, Inc.*, 561 S.E.2d 456, 254 Ga. App. 119 (2002) (applying strict scrutiny).

Restrictive covenants ancillary to the sale of a business are traditionally afforded substantial protection and are viewed with the least degree of scrutiny. *W. Coast Cambridge, Inc. v. Rice*, 584 S.E.2d 696, 262 Ga. App. 106 (2003) (restrictive covenants in agreement between physician shareholders and partnership which prohibited physician shareholders from engaging in business competing with partnership was ancillary to sale of business and properly viewed with lesser degree of scrutiny); *Hicks v. Doors by Mike, Inc.*, 579 S.E.2d 833, 260 Ga. App. 407 (2003) (applying lesser degree of scrutiny).

The classification of an agreement as ancillary to employment or to the sale of a business depends on the particular factual circumstances of each case. *Palmer & Cay, Inc. v. Marsh & McLennan Cos.*, 404 F.3d 1297 (11th Cir. 2005). The Georgia Supreme Court has recognized this classification is not obvious with some agreements. *White v. Fletcher/Mayo/Assocs., Inc.*, 303 S.E.2d 746, 251 Ga. 203 (1983). "When the buyer of a business argues that a covenant was given ancillary to his employment, Georgia law requires that [the court] analyze the bargaining capacity of the covenantor to determine whether he is more like an owner of the business or an employee." *Palmer & Cay, Inc. v. Marsh & McLennan Cos.*, 404 F.3d 1297, 1304 (11th Cir. 2005).

However, the type of contract should not automatically determine the applicable level of scrutiny. Instead, some courts advise looking to the purposes behind the varying levels of scrutiny to determine which level is most appropriate, including the relative bargaining power of the parties and whether there is independent consideration for the restrictive covenant itself. *W. Coast Cambridge, Inc. v. Rice*, 584 S.E.2d 696, 262 Ga. App. 106 (2003); *Swartz Invs., Inc. v. Vion Pharms., Inc.*, 556 S.E.2d 460, 252 Ga. App. 365 (2001). For a good discussion on Georgia's levels of scrutiny for restrictive covenants, *see generally Advance Tech. Consultants, Inc. v. RoadTrac, LLC*, 551 S.E.2d 735, 250 Ga. App. 317 (2001).

#### v. Damages for Breach

Profits gained by the defendant, and lost profits and damages incident to the breach, including general damages, but not punitive damages, are recoverable for breach of a covenant-not-to-compete. *Williamson v. Palmer*, 404 S.E.2d 131, 199 Ga. App. 35 (1991); *Robert B. Vance & Assocs. v. Baronet Corp.*, 487 F. Supp. 790 (N.D. Ga. 1979). An injunction may lie in restrictive covenant cases even where damages are sought. *Saxton v. Coastal Dialysis & Med. Clinic, Inc.*, 470 S.E.2d 252, 220 Ga. App. 805, aff'd, 476 S.E.2d 587, 267 Ga. 177 (1996). Liquidated damages provisions are not per se illegal or unenforceable in Georgia. Liquidated damages provisions are enforceable if “the injury caused by the breach of contract is difficult or impossible to estimate, the parties intend to provide for damages, and the sum stipulated is a reasonable pre-estimate of the probable loss.” *Banderas v. Doman*, 480 S.E.2d 252, 224 Ga. App. 198 (1997); *see also Allied Informatics, Inc. v. Yeruva*, 554 S.E.2d 550, 251 Ga. App. 404 (2001) (holding liquidated damages provision unenforceable because damages not difficult to calculate and stipulated sums not reasonable pre-estimates of probable loss).

#### vi. Writing Requirement

Employee non-competition covenants must be in writing.

##### B. Blue Penciling

*See* Sections XI.A.4.k., 5.e.

##### C. Confidentiality Agreements

*See* Section XI.A.5.f. *See also* Section XI.A.4.h.

##### D. Trade Secrets Statute

###### 1. Generally

The Georgia Trade Secrets Act, O.C.G.A. § 10-1-760 *et seq.*, is nearly identical to the Uniform Trade Secrets Act. Under the Georgia law, “trade secret” means information, without regard to form, 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 which is not commonly known by or available to the public and which information: (1) 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 (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. O.C.G.A. § 10-1-761(4). *See, e.g., AmeriGas Propane, L.P. v. T-Bo Propane, Inc.*, 972 F. Supp. 685 (S.D. Ga. 1997) (holding that customer list is a Trade Secret if not readily ascertainable by third parties and if it contains information beyond name, address and contact person); *Leo Publ'ns, Inc. v. Reid*, 458 S.E.2d 651, 265 Ga. 561 (1995) (holding that customer

lists could only be protected from disclosure if they contained highly specialized information).

The fact that some of the components of a trade secret are well-known does not preclude protection for a secret combination, compilation, or integration of individual elements. *Essex Group, Inc. v. Southwire Co.*, 501 S.E.2d 501, 269 Ga. 553 (1998) (affirming issuance of permanent injunction). In addition, in reaction to a holding by the Georgia Supreme Court that intangible customer information could not constitute a trade secret, *Avnet, Inc. v. Wyle Labs., Inc.*, 437 S.E.2d 302, 263 Ga. 615 (1993), the definition of Trade Secret was amended to additionally state: “Trade secrets are *the property of the employer* and cannot be taken or used by the employee for his own benefit, but *customers are not trade secrets*. Knowledge on the part of the employee concerning the names and addresses of customers is *not* the property of the employer.” *Id.* at 304, 263 Ga. at 618. Arguably, however, the amendment does not specifically modify the definition so as to overrule *Avnet*. See *Stone v. Williams Gen. Corp.*, 597 S.E. 2d 456, 266 Ga. App. 608 (2004) *rev’d on other grounds*, 614 S.E.2d 758, 279 Ga. 428 (2005) (upholding jury charge that “a trade secret must be in tangible form such as a written document” as consistent with *Avnet*).

Information can lose protected status as a trade secret if reasonable steps are not taken to maintain its secrecy. See *Infrasource, Inc. v. Hahn Yalena Corp.*, 613 S.E.2d 144, 272 Ga. App. 703 (2005) (holding that bid numbers were not protectable as a trade secret because company did not undertake reasonable efforts to maintain secrecy); *Bacon v. Volvo Serv. Ctr., Inc.*, 597 S.E.2d 440, 266 Ga. App. 543 (2004) (holding that customer list was not a Trade Secret where the employer took no precautions to maintain its confidentiality; information was on computers, was not password-protected, and was available to technicians who, through repair orders, were permitted to retain the computers indefinitely); *Equifax Servs. Inc. v. Examination Mgmt. Servs., Inc.*, 453 S.E.2d 488, 216 Ga. App. 35 (1994) (finding that sole step of requiring employees to sign confidentiality agreements was not sufficient because the plaintiff had failed to take steps to enforce its confidentiality agreements; other protections would have included clearly marking documents confidential, limiting distribution of certain information on need-to-know basis, requiring all persons who possess copies of the information to maintain it in secure areas, and including specific references to any confidential information in confidentiality agreements). See also *Ga. Dep’t of Natural Res. v. Theragenics Corp.*, 545 S.E.2d 904, 273 Ga. 724 (2001) (holding that where corporation required to disclose documents, including trade secrets, to the state agency and when state agency faced with Open Records Act request, and corporation seeks to designate more documents as confidential, the relevant analysis of whether corporation used reasonable efforts to protect the Trade Secrets requires analysis of agency’s non-disclosure obligations under the Open Records Act).

“Misappropriation” is the (1) acquisition of a Trade Secret of another by a person who knows or has reason to know that the Trade Secret was acquired by improper means; or (2) disclosure or use of a Trade Secret of another without express or implied consent. O.C.G.A. § 10-1-761(2). See *Tronitec, Inc. v. Shealy*, 547 S.E.2d 749, 249 Ga. App. 442, *overruled on other grounds* by *Williams Gen. Corp. v. Stone*, 614 S.E. 2d 758, 279 Ga. 428 (2005) (2001) (holding that to constitute misappropriation of customer list, there must be an actual physical taking).

To establish liability for the misappropriation of a Trade Secret, a plaintiff must show that the defendant (1) disclosed information that enabled a third party to learn the Trade Secret, or (2) used a “substantial portion” of the plaintiff’s trade secret to create an improvement or modification that is “substantially derived” from the plaintiff’s trade secret. *Penalty Kick Mgmt. Ltd. v. Coca Cola Co.*, 318 F.3d 1284, 1293 (11th Cir. 2003). Specifically, “[t]he unauthorized use need not extend to every aspect or feature of the trade secret; use of any *substantial portion* of the secret is sufficient to subject the actor to liability.” *Id.* at 1292-93. Likewise, the actor does not necessarily have to use the Trade Secret in its original form. An actor “is liable for using the trade secret with independently created improvements or modifications if the result is *substantially derived* from the trade secret . . .” *Id.* at 1293.

## 2. Protection Against Misappropriation

The protection of a Trade Secret under the Georgia Act is independent of any contractual or common law. The Georgia Act preempts any conflicting tort, restitutionary and other laws of the State of Georgia that provide civil remedies for the misappropriation of a Trade Secret. O.C.G.A. § 10-1-767. However, the Georgia Act shall not preempt any contractual duties, restrictions or remedies, whether or not based upon misappropriation of a Trade Secret; provided, however, that a contractual duty to maintain a trade secret or limit the use of a Trade Secret shall not be deemed void or unenforceable solely for the lack of a duration or geographic limitation on that duty. If the information is a Trade Secret, the Act provides automatic protection against the misappropriation of the information in addition to any contractual protections which may exist. The Georgia Act provides that a Trade Secret may be protected through contractual means even without limitations on duration or territorial coverage. O.C.G.A. § 10-1-763(c). Compare *U3S Corp. of Am. v. Parker*, 414 S.E.2d 513, 202 Ga. App. 374 (1991) (finding that any contractual restrictions on disclosure of confidential business information which does not constitute a Trade Secret must contain a term of duration in order to be enforceable).

## 3. Remedies

The Georgia Act provides for both legal and equitable relief for the misappropriation of a trade secret. The Georgia Act gives the courts the discretion to issue an injunction to prevent any actual or threatened misappropriation of a trade secret, O.C.G.A. § 10-1-762, and entitles the owner of a trade secret to recover damages for its misappropriation. O.C.G.A. § 10-1-763(a). Cf. *Advance Tech. Consultants, Inc. v. RoadTrac, L.L.C.*, 512 S.E.2d 27, 236 Ga. App. 582 (1999) (finding that, in breach of contract and misappropriation of trade secrets proceedings, one party should not have unlimited access to other’s customer information, marketing lists, pricing policies, etc.; abuse of discretion for failing to formulate protection for party’s nontechnical trade secret, proprietary and confidential information).

The damages recoverable are measured by the value of the loss caused and the unjust enrichment enjoyed or, if such damages are immeasurable, by the amount of a reasonable

royalty. If a trade secret has been willfully and maliciously misappropriated, the court may award exemplary damages up to twice the amount of the “actual” damages. O.C.G.A. § 10-1-763(b). *See, e.g., Brandenburg v. All-Fleet Refinishing, Inc.*, 555 S.E.2d 508, 252 Ga. App. 40 (2001) (finding that exemplary damage award for willful and malicious conduct was supported by evidence that competitor hired corporation’s employees, stole corporation’s software, and actively solicited corporation’s customers).

#### E. Fiduciary Duty and Other Considerations

In *Hilb, Rogal & Hamilton Co. of Atlanta, Inc. v. Holley*, the Court addressed the issue of breach of fiduciary duty in the context of a restrictive covenant. 670 S.E.2d 874, 295 Ga. App. 54 (2008). Pursuant to the employee’s employment agreement, the employee received an additional amount as consideration for a noncompete agreement. The employee also served as vice president of the company and therefore owed a duty of good faith and loyalty to the company. The Court found that the employee acted in competition to the company months prior to his resignation. Thus, the Court held that the jury was authorized to conclude that the employee violated his fiduciary duty to his former employer, although ultimately finding for the employee on the restrictive covenant claim because the agreement was unenforceable.

## **XII. DRUG TESTING LAWS**

#### A. Public Employers

The Drug-free Public Work Force Act of 1990 governs employment of public servants who have been convicted of drug-related offenses. O.C.G.A. § 45-23-1 *et seq.* The Act provides guidelines for suspension, termination and ineligibility for public employment of persons convicted of drug offenses. In addition, state employees in high risk jobs must be randomly tested for use of illegal drugs. O.C.G.A. § 45-20-91. All contractors with the state, other than an individual, must certify that they will provide a drug-free workplace for employees and ensure that subcontractors provide a drug-free workplace. O.C.G.A. § 50-24-2 *et seq.*

#### B. Private Employers

Georgia law explicitly recognizes a private employer’s right to implement a drug and alcohol testing program and promote a drug-free workplace. O.C.G.A. § 34-9-410 *et seq.* Specifically, under the Workers’ Compensation provisions of the Georgia Code, an employer may qualify for not less than a seven and one-half percent premium discount under its workers’ compensation insurance policy if it implements a Drug-Free Workplace Program substantially in accordance with O.C.G.A. § 34-9-413. *See* O.C.G.A. § 34-9-412. Generally, the program must include (1) notice and a written policy statement, (2) substance abuse testing, (3) resources of employee assistance providers, (4) employee education, and (5) supervisor training. In addition, the Drug-Free Workplace Program must be implemented in compliance with the confidentiality standards provided in O.C.G.A. § 34-9-420.

Under the Drug-free Workplace Program, employers must also notify employees of the consequences of testing positive for drugs and the consequences of refusing to submit to a drug test. O.C.G.A. § 34-9-414. Georgia Workers' Compensation law denies compensation for injuries which are due to alcohol or drug consumption. O.C.G.A. § 34-9-17. Georgia law further mandates that, if the employee unjustifiably refuses to submit to a reliable, scientific drug test to be performed in the manner set forth in the Drug-Free Workplace Program Act, then a rebuttable presumption arises that the injury was caused by alcohol or drugs. O.C.G.A. § 34-8-194(2)(c).

In addition, Georgia case law has established that an employee of a self-insured employer that has *not* established a Drug-Free Workplace Program has no right to notice that his workers' compensation benefits may be denied based on a refusal to submit to a drug test following an on-the-job injury. This means that the employer has no legal obligation to notify the employee that his refusal to be drug tested raises a rebuttable presumption that his injury was caused by alcohol or drug consumption, thereby jeopardizing his chances of receiving workers' compensation benefits. *Ga. Self-Insurers Guaranty Trust Fund v. Thomas*, 501 S.E.2d 818, 269 Ga. 560 (1998); *see also Ga.-Pac. Corp. v. Ivey*, 549 S.E.2d 471, 250 Ga. App. 181 (2001) (holding that an employee who violates his employer's anti-drug policy may be disqualified from receiving unemployment benefits, even though the employer has not met the statutory requirements for establishing a drug-free workplace program).

### **XIII. STATE ANTI-DISCRIMINATION STATUTES**

#### **A. Employers/Employees Covered**

Georgia's anti-discrimination statutes vary in their coverage of employers and employees.

##### **1. Fair Employment Practices Act, O.C.G.A. § 45-19-20 *et seq.***

The Fair Employment Practices Act of 1978 applies only in public employment. A "public employer" means "any department, board, bureau, commission, authority, or other agency of the state which employs 15 or more employees within the state for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." O.C.G.A. § 45-19-22(5). "Public employment" means "employment by any department, board, bureau, commission, authority, or other agency of the State of Georgia." O.C.G.A. § 45-19-22(6).

##### **2. Age Discrimination, O.C.G.A. § 34-1-2**

The prohibition against age discrimination in employment applies to any "person, firm, association, or corporation carrying on or conducting within this state any business requiring the employment of labor." O.C.G.A. § 34-1-2(a). The statute prohibiting age discrimination covers all employers regardless of the number of employees. The protection against age discrimination extends to individuals between the ages of 40 and 70 years old. *Id.*

3. Sex Discrimination in Employment, O.C.G.A. § 34-5-1 *et seq.*

The prohibition against sex discrimination in employment, commonly known as the Equal Pay law, applies to any employer engaged in intrastate commerce who employs 10 or more employees. O.C.G.A. § 34-5-2(4).

4. Georgia Equal Employment for Persons with Disabilities, O.C.G.A. § 34-6A-1 *et seq.*

Georgia's disability discrimination statute applies to any employer with 15 or more employees. O.C.G.A. § 34-6A-2. Similar to its federal counterpart, the state law covers an "individual with disabilities" meaning "any person who has a physical or mental impairment which substantially limits one or more of such person's major life activities and who has a record of such impairment." *Id.* This statute was not updated to reflect changes in the federal law per the Americans with Disabilities Act Amendments of 2008. Explicitly excluded from coverage is any individual addicted to using drugs or alcohol.

B. Types of Conduct Prohibited

1. Fair Employment Practices Act of 1978

The Fair Employment Practices Act prohibits discrimination against all individuals in public employment because of an individual's race, color, religion, national origin, sex, disability, or age. O.C.G.A. § 45-19-29. The Act does not currently protect against discrimination based on marital status or smoking status, however, a cautious employer should verify that no local-level ordinances exist to extend such coverage.

2. Age Discrimination

An employer is prohibited from discriminating against any individual between the ages of 40 and 70 years, solely on the basis of age, when the reasonable demands of the position do not require such an age distinction, provided that the individual is otherwise qualified physically, mentally, and by training and experience to satisfactorily perform the job. O.C.G.A. § 34-1-2. The statute does not affect any legitimate retirement policy or system. When a retirement or insurance benefit program prohibits employment of any person because of excess age, the person must be allowed to waive the right to participate in the program as a condition of employment. Also, the statute does not prohibit compulsory retirement of any employee "who has attained 65 years of age but not 70 years of age and who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policy-making position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit . . . [of] at least \$27,000.00." *Id.*

3. Sex Discrimination

An employer is prohibited from discriminating between employees on the basis of sex by paying wages to employees of one sex at a lesser rate than the rate paid to employees of the opposite sex for equal work in jobs which require equal skill, effort, and responsibility and which are performed under similar working conditions. O.C.G.A. § 34-5-3. Differentials in wage payments are permissible where such payments are made pursuant to (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or (4) a differential based on any other factor other than sex. An employer cannot reduce the wage rate of an employee in order to comply with the statute. Employers must post a copy of this chapter in a conspicuous place in or about the work premises. In addition, the statute protects an employee acting under it from retaliation.

#### 4. Georgia Equal Employment for Persons with Disabilities

An employer shall not discharge or discriminate against any individual with disabilities with respect to wages, rates of pay, hours or other terms and conditions of employment because of such person's disability unless the disability restricts the individual's ability to engage in the particular job for which he is eligible. O.C.G.A. § 34-6A-4. The statute does not require an employer to modify its physical facilities or grounds in any way or exercise a higher degree of caution for an individual with disabilities. Likewise, the statute does not prohibit otherwise lawful employment practices or requirements merely because they affect a greater proportion of individuals with disabilities within the area from which the employer customarily hires his employees. Retaliation is also prohibited. O.C.G.A. § 34-6A-5. *See also* O.C.G.A. § 34-6A-3 (permitted conduct).

#### C. Administrative Requirements

##### 1. Fair Employment Practices Act of 1978

A public employee must exhaust administrative remedies before filing suit in Superior Court. A public employee must file a complaint of unlawful discrimination with the administrator of the Office of Fair Employment Practices and within 90 days the administrator determines whether there is reasonable cause to believe the employer engaged in an unlawful employment practice. If the administrator finds no unlawful employment practice, the employee can appeal once to the administrator and then to the appropriate federal agency or Georgia Superior Court. If the administrator finds reasonable cause that an unlawful employment practice occurred, the complaint is referred to a special master for an evidentiary hearing. If the special master finds for the employer, the employee can appeal to the Georgia Superior Court which shall review the claim under an abuse of discretion standard. O.C.G.A. § 45-19-36.

##### 2. Age Discrimination

Georgia's Age Discrimination statute is penal but does not give rise to a private cause of action for the conduct proscribed. *Calhoun v. Fed. Nat'l Mortg. Ass'n*, 823 F.2d 451 (11th Cir.

1987); *see also Mattox v. Yellow Freight Sys., Inc.*, 534 S.E.2d 561, 243 Ga. App. 894 (2000) (confirming that Georgia’s Age Discrimination statute does not give rise to private cause of action).

### 3. Sex Discrimination in Employment

There are no administrative requirements to satisfy before an individual may pursue a private cause of action under the Equal Pay law. A court action may be commenced no later than one year after the cause of action accrues. In addition, the employer and employee each have the right to request arbitration of any dispute covered by the Equal Pay law. The party requesting arbitration must file written notice of his request with the opposing party, and within 30 days of receiving notice, the other party must either accept or reject the arbitration offer. The decision of the arbitrator is binding upon the parties, except that either party may appeal the decision to any court of competent jurisdiction within 30 days from publication of the decision. O.C.G.A. § 34-5-6.

### 4. Georgia Equal Employment for Persons with Disabilities

Actions alleging unfair employment practices under this chapter must be brought within 180 days after the alleged prohibited conduct occurred. O.C.G.A. § 34-6A-6.

## D. Remedies Available

### 1. Fair Employment Practices Act of 1978

Upon a finding that an employer engaged in unlawful practices, a special master may order remedial action including, but not limited to, hiring, reinstatement, or upgrading of employees with or without back pay, workers’ compensation benefits, interim earnings, unemployment benefits, and eradication of the unlawful employment practice. Additionally, the Superior Court may award attorney’s fees and costs in the action to a successful plaintiff. O.C.G.A. § 45-19-38.

### 2. Age Discrimination

“Any person or corporation who violates [the statute] . . . shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than \$100.00 nor more than \$250.00.” O.C.G.A. § 34-1-2(b).

### 3. Sex Discrimination in Employment

Any employer who violates the Equal Pay law shall, upon conviction thereof, be punished by a fine not to exceed \$100.00. O.C.G.A. § 34-5-3(c). In a private cause of action, if the court finds that the employer violated the statute, the employer shall be liable to the employee for his unpaid wages and may be ordered to pay costs and attorney’s fees not to exceed

25 percent of the judgment. O.C.G.A. § 34-5-5(a).

#### 4. Georgia Equal Employment for Persons with Disabilities

In a civil action brought under the statute, a court may grant a permanent or temporary injunction, temporary restraining order, or other order, including but not limited to hiring, reinstatement, or upgrading of employees. Back pay is also available and a prevailing party may be awarded court costs and reasonable attorneys' fees. O.C.G.A. § 34-6A-6.

### XIV. STATE LEAVE LAWS

#### A. Jury/Witness Duty

An employer may not discharge, discipline, or otherwise penalize an employee because the employee was absent from employment for the purpose of attending a judicial proceeding in response to a subpoena, summons for jury duty, or other court order or process which requires the attendance of the employee at the judicial proceeding. O.C.G.A. § 34-1-3. There is no protection under the statute, however, where the employee is charged with a crime. O.C.G.A. § 34-1-3(c). The law not only protects employees who are absent from work because of jury duty, but attendance at any judicial proceeding in which their presence is required. *See Glover v. Scott*, 435 S.E.2d 250, 210 Ga. App. 25 (1993) (employee who missed work because she was attending her son's juvenile court hearing as required under law was covered).

In addition, an employee is protected regardless of whether the judicial proceeding is in Georgia, and regardless of whether the employee is a Georgia resident. 1995 Ga. Op. Att'y Gen. 95-13. An employer may require that the employee provide "reasonable notification" of the employee's expected absence or delay in reporting to work in order to attend a judicial proceeding.

Additionally, it is unlawful to fire an employee because the employee was absent from work in order to attend a judicial proceeding, and the employer may not "otherwise penalize" the employee. The Attorney General has interpreted this prohibition to mean that the employee may not suffer any financial loss. 1989 Ga. Op. Att'y Gen. 89-126. An employer who violates this provision is liable to the injured employee for all actual damages suffered by the employee and for the employee's reasonable attorneys' fees. The statute does allow for a private cause of action, but it does not create a separate criminal offense for violation. 1995 Ga. Op. Att'y Gen. 95-13.

#### B. Voting

Upon reasonable notice to their employer, employees shall be permitted to take any necessary time off from employment to vote. Necessary time off shall not exceed two hours. If the employer's hours of work commence or end at least two hours after the opening or closing of the polls, then time off shall *not* be available. The employer may specify the hours during which

the employee may be absent. O.C.G.A. § 21-2-404.

C. Family/Medical Leave

Georgia does not have a family and medical leave law.

For public employees, leaves of absence for blood donations and for organ or bone marrow donations are provided for by statute. O.C.G.A. § 45-20-30 (blood donations); O.C.G.A. § 45-20-31 (organ, bone marrow donations). Public employees are permitted a leave of absence, without loss of pay, of not more than eight hours per calendar year for the purpose of donating blood. O.C.G.A. § 45-20-30. The absence is to be computed at two hours per donation, up to four times per year. An employee who donates blood platelets or granulocytes is permitted a leave of absence, without loss of pay, of not more than 16 hours per calendar year which shall be computed at four hours per donation, up to four times per year. *Id.*

Similarly, a public employee who serves as an organ or bone marrow donor for the purpose of transplantation shall receive a leave of absence, with pay, of 30 days and such leave shall not be charged against or deducted from any annual or sick leave and shall be included as service in computing any retirement or pension benefits. O.C.G.A. § 45-20-31. The employee must furnish a statement from a medical practitioner who is to perform the transplantation procedure or from a hospital administrator that the employee is serving as a donor. *Id.*

In 2017, the Georgia Legislature passed a “kin care law” requiring private employers who already offer paid sick leave (or choose to do so in the future) to allow their employees to use up to five days of accrued leave per year to care for immediate family members. S.B. 201, codified at O.C.G.A. § 34-1-10. The kin care law applies to employers with more than 25 employees and only to employees who work at least 30 hours per week. *Id.* Under the law’s definitions, “immediate family member” means “an employee’s child, spouse, grandchild, grandparent, or parent or any dependents as shown in the employee’s most recent tax return.” *Id.* The law expressly does not create a private cause of action, nor does it include any other enforcement measures.

D. Pregnancy/Maternity/Paternity Leave

Other than the federal Family and Medical Leave Act, which covers pregnancy, maternity, and paternity leave, Georgia law specifically provides for a “leave of absence for maternity reasons” for “a female employed by a public school system.” O.C.G.A. § 20-2-852; *see also* 29 C.F.R. §§ 825.112, 825.120.

E. Day of Rest Statutes

Any business which operates on either of the two rest days (Saturday or Sunday) and employs those whose habitual day of worship has been chosen by the employer as a day of work shall make all reasonable accommodations to the religious, social, and physical needs of such

employee so that those employees may enjoy the same benefits as employees in other occupations. O.C.G.A. § 10-1-573.

#### F. Military Leave

Georgia has its own military leave laws in addition to the federal Uniformed Services Employment and Re-employment Rights Act (USERRA). Georgia laws differentiate between public and private employers.

A person who leaves a position (other than a temporary position) with a private employer to perform military service is entitled to be restored to the position or a position of like seniority, status and pay if the person: (1) receives a certificate of completion from an officer of the armed forces or organized militia; (2) is still qualified to perform the duties of the position; and (3) applies for re-employment within 90 days after relief from such service. O.C.G.A. § 38-2-280(a). *See also* O.C.G.A. § 38-2-279 (related statute applying to absences of public officers and employees). The person is not entitled to reinstatement if the employer's circumstances have so changed as to make it impossible or unreasonable to reinstate the returning service member.

A person who temporarily leaves a position (other than a temporary one) to participate in assemblies or annual training pursuant to O.C.G.A. § 38-2-25 or to attend service schools conducted by the armed forces for periods up to 6 months is entitled to restoration if the person is qualified to perform the duties of the position and makes an application for reemployment within ten days after completion of the service. However, a person is not entitled to reinstatement if his attendance at assemblies or any service school or schools exceeds a total of 6 months in any 4 year period. O.C.G.A. § 38-2-280(b).

A person is also entitled to restoration if he: (1) is discharged or suspended from a position by his employer because of membership in the organized militia or reserve component of the armed forces; (2) is qualified to perform the duties of the position; and (3) applies for reemployment within ten days after discharge or suspension. If the person is serving on military duty at the time notice of discharge or suspension is received, the ten day period will not begin to run until the next day following the date of completion of such service. O.C.G.A. § 38-2-280(c).

A person who is restored to a position under this statute shall be: (1) considered as having been on furlough or leave of absence; (2) restored without loss of seniority; (3) entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence; and (4) shall not be discharged from the position without cause within one year after restoration. O.C.G.A. § 38-2-280(e).

In 2016, the Georgia Legislature amended O.C.G.A. § 38-2-280(d) to add protections for members of the National Guard of states other than Georgia who work for Georgia employers. 2016 Georgia Laws Act 454 (H.B. 831). The law already provided protection to members of the Georgia National Guard before the 2016 amendment.

## G. Sick Leave

Effective July 1, 2017, an employer that provides sick leave must allow an employee to use his or her sick leave for the care of an immediate family member. O.C.G.A. § 34-1-10. The law does not require employers to offer paid leave—it mandates only that employers who already offer paid sick leave allow employees to use leave to care for their immediate family members. *Id.*

The new law, which applies to employees who work 30 or more hours a week for an employer that employs 25 or more workers, defines “immediate family member” as an employee’s “child, spouse, grandchild, grandparent, or parent, or any dependents as shown in the employee’s most recent tax return.” O.C.G.A. § 34-1-10 (3), (4). Coverage includes private employers and public entities of the State of Georgia. O.C.G.A. § 34-1-10 (3). The employer is not required to allow an employee to use more than 5 days of earned sick leave.

Notably, the new statute indicates that “nothing in this [law] shall be construed to create a new cause of action against an employer.” Additionally, there is no specific enforcement provision, so it is unclear how employees can enforce their rights in court if an employer violates the law. O.C.G.A. § 34-1-10 (d).

## XV. STATE WAGE AND HOUR LAWS

### A. Current Minimum Wage in State

Georgia Minimum Wage Law, O.C.G.A. § 34-4-1 *et seq.*, does *not* apply to any employer who is subject to the minimum wage provision of any act of Congress. O.C.G.A. § 34-4-3(c). Where applicable, state law requires that employees be paid a minimum wage of not less than \$5.15 per hour. O.C.G.A. § 34-4-3(a). Every employer subject to the state’s minimum wage law must maintain records showing the hours worked by each employee and the wages paid. O.C.G.A. § 34-4-5.

### B. Deductions from Pay

Georgia law does not provide for specific deductions from pay.

### C. Overtime Rules

Georgia law does not maintain state-specific overtime rules.

### D. Time for Payment Upon Termination

#### 1. Payment of Wages, O.C.G.A. § 34-7-2, Generally

Employers must pay employees at least twice a month on regular paydays. Department heads or subheads who may be employed by the month or year at stipulated salaries are excluded. Payment by credit transfer such as direct deposit or payroll card account may be permissible. *See* O.C.G.A. § 34-7-2(b). Direct deposit may be used only with the consent of the employee. Employers who use payroll card accounts must provide employees with a written explanation of any fees associated with the account, and must also provide the ability to opt out of payment to a payroll card account in favor of either paper checks or direct deposit. O.C.G.A. § 34-7-2(c). Exceptions apply to employers engaged in the farming, sawmill, and turpentine industries.

## 2. Payment Upon Termination

Georgia law does not specifically address the time for paying wages upon an employee's termination.

### E. Other Issues

#### 1. Regulation of Child Labor, O.C.G.A. § 39-2-1 *et seq.*

In addition to applicable federal regulations, Georgia law regulates various aspects of the employment of minors including limiting the age of employment, requiring work permits, restricting employment in hazardous occupations and limiting the hours of employment. “No minor under 12 years of age should be employed or permitted to work in any gainful occupation at any time.” O.C.G.A. § 39-2-9. This limitation does not apply to “employment of a minor in agriculture, domestic service in private homes, or any specific employment permitted... or to employment by a parent or a person standing in the place of a parent.” *Id.* Minors 14 years of age or older may be employed during school vacation in the care and maintenance of lawns, gardens, and shrubbery owned or leased by the employer of such minor, including the operation of related equipment. O.C.G.A. § 39-2-11.1. Minors under 16 years of age may be employed to sell or deliver newspapers in residential areas, O.C.G.A. § 39-2-6, and may be employed as actors or performers. O.C.G.A. § 39-2-18.

Employers hiring minors are required to obtain age certificates verifying the ages of the minors. An employer hiring a minor between the ages of 12 and 16 must obtain a certificate showing the true age of the minor and that the minor is not less than 12 years old and is physically fit to engage in the employment sought to be obtained. O.C.G.A. § 39-2-11(a). The certificate is generally issued by the school superintendent in the county or city where the minor resides. No employment certificate shall be issued to any minor until he submits certain documents including (1) a certified copy of a birth certificate or birth registration card; and (2) a statement from the prospective employer indicating that if he were furnished with a certificate, he could employ the minor immediately and describing the type of employment offered. O.C.G.A. § 39-2-11(c). By furnishing such a statement, a prospective employer does not undertake to employ the minor for any specific period of time. Upon termination, the employer must return the employment certificate to the issuing officer within 5 days of the termination

date. O.C.G.A. § 39-2-13(a).

A similar certificate must be obtained to employ a minor between the ages of 16 and 18 and a copy of the certificate must be made a part of the minor's school file. The superintendent of schools or authorized staff member must issue an identification card to each minor in this category which certifies that the minor is eligible for employment. O.C.G.A. § 39-2-11(d). The minor is exempt from future filings of employment certificates unless his certificate is revoked.

The employment certificate for all minors must be accompanied by a letter from the minor's school administrator indicating that he is enrolled in school full-time and has an attendance record in good standing for the current academic year. O.C.G.A. § 39-2-11(e). The employer must maintain both a copy of the certificate and the letter in the minor's employment file. The letter is to be updated in January of each subsequent academic school year during which the minor maintains his employment until the minor reaches age 18, graduates, or terminates his secondary education and is enrolled in a postsecondary school. An employer failing to comply with this requirement is guilty of a misdemeanor and is subject to a fine of up to \$1,000, 12 months imprisonment, or both. This new requirement may be waived upon clear and convincing evidence that its enforcement would create an undue hardship on the minor or the minor's family or if there is clear and convincing evidence that the enforcement would act as a detriment to the health or welfare of the minor. O.C.G.A. § 39-2-11(e)(2).

In addition, Georgia law restricts the employment of minors in certain hazardous conditions. No minor under 16 years of age shall be employed by or permitted to work in or about "any mill factory, laundry, manufacturing establishment, or workshop nor in any occupation which has been designated as hazardous." O.C.G.A. § 39-2-1. The Georgia Commissioner of Labor has promulgated a list of hazardous occupations in which the employment of minors under age 16 is prohibited. Ga. Comp. R. & Reg. 300-7-2-.01. The list contains a catch-all which prohibits the employment of minors under age 16 in any occupation "that a reasonable person in good conscience would consider dangerous to the life, limb or injurious to the health and/or morals of such minor." Ga. Comp. R. & Reg. 300-7-2-.01. The certificate required for minors age 16 through 18 must show that the minor is fully 16 years old in order to be employed in any dangerous occupation.

Georgia law regulates the hours of employment for minors. Minors under age 16 may not work more than 4 hours on a school day or more than 8 hours on any other day, or more than 40 hours in any given week. O.C.G.A. § 39-2-7. Minors under age 16 are not permitted to work between the hours of 9:00 p.m. and 6:00 a.m. O.C.G.A. § 39-2-3. Minors under age 16 may not be employed during school hours unless they have completed senior high school or been excused by the county board of education. O.C.G.A. § 39-2-4. State law does not regulate the hours of employment for minors age 16 to 18.

The state minimum wage law exempts any employee who is a high school or college student and any individual employed as a newspaper carrier. O.C.G.A. § 34-4-3(b).

## 2. Garnishment Proceedings, O.C.G.A. § 18-4-1 *et seq.*

It is unlawful to discharge an employee as a result of garnishment for any one indebtedness. O.C.G.A. § 18-4-5.

Garnishment of wages cannot exceed the lesser of 25% of an employee's disposable earnings during a workweek or the amount by which the employee's disposable earnings exceed 30 times the federal minimum wage. O.C.G.A. § 18-4-5. Up to 50% of an employee's wages may be garnished if based on a judgment for alimony or child support. O.C.G.A. § 18-4-53.

An employer may recover reasonable expenses, including reasonable attorney's fees (up to \$100.00), for answering the garnishment. O.C.G.A. § 18-4-14. If actual fees exceed this amount, the employer can petition the court for a hearing at the time of answering the garnishment and without deducting from the amount paid into the court. Upon hearing from the parties, the court may enter an order for payment of actual attorney's fees or expenses proved to have been incurred reasonably. O.C.G.A. § 18-4-14(b).

If an employee whose wages are subject to a continuing garnishment is terminated, the employer is discharged from further obligation with respect to the period of continuing garnishment remaining after the employment relationship is terminated. O.C.G.A. §§ 18-4-4; 18-4-42.

Employee benefit funds are not subject to garnishment until they are currently due and payable or transferable, unless the garnishment is for alimony or child support. O.C.G.A. §§ 18-4-6; 18-4-53.

## 3. Methods of Payment, O.C.G.A. § 34-7-2

Georgia law permits employers to compensate their employees by cash, check, direct deposit (as long as the employee has given consent), or, as recently amended, credit to a payroll card account. O.C.G.A. § 34-7-2(b). A payroll card account is defined as "an account that is directly or indirectly established through a person, firm, or corporation employing wageworkers or other employees to which electronic fund transfers of the wages or salary of such employees are made on a recurring basis, whether the account is operated or managed by such person, firm, or corporation or a third-party payroll processor, a depository institution, or any other person." O.C.G.A. § 34-7-2(a). In order to pay employees through a payroll card account, the employer must abide by the requirements outlined in the statute. *See* O.C.G.A. § 34-7-2(c).

## **XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES**

### A. Smoking in Workplace

Smoking is prohibited in all enclosed areas of employment in Georgia, with some limited

exceptions. O.C.G.A. §§ 31-12A-5, -6. One of these exceptions allows employees to smoke inside the place of employment within certain areas designated by the employer. O.C.G.A. § 31-12A-6(a)(11). To fit within this exemption, the smoking areas designated by the employer must: 1) be located in a nonwork area where no employee, as part of his/her work responsibilities, shall be required to enter; 2) must maintain an air handling system that is independent from the main air handling system that serves all other areas of the building and which exhausts all air within the smoking area directly to the outside; 3) be for employee use only; and 4) have a sign posted conspicuously at every entrance.

Counties and cities within Georgia may also have their own smoking ordinances, and may be more restrictive than state law. *See, e.g.*, Chatham County, Georgia, County Code § 21-905.

#### B. Health Benefit Mandates for Employers

O.C.G.A. § 33-1-19 establishes a Special Advisory Commission on Mandated Health Insurance Benefits “to advise the Governor and the General Assembly on the social and financial impact of current and proposed mandated benefits and providers.” O.C.G.A. § 33-1-19(a). The Advisory Commission is essentially charged with gathering and analyzing information on current and proposed health benefit mandates to assist with future decisions regarding health benefit mandates. O.C.G.A. § 33-1-19(d).

#### C. Immigration Laws

##### 1. State Employers and State Contractors

Every public employer must register and participate in the federal work authorization program (E-Verify) and verify the information for all new employees. O.C.G.A. § 13-10-91(a). Contractors and subcontractors wishing to enter into contracts with state agencies, departments and other instrumentalities of the state must register and participate in the federal E-Verify program for newly hired employees to verify their employees’ lawful employment in the United States. O.C.G.A. § 13-10-91(b).

The Act requires every public employer to participate in E-Verify to verify employment eligibility of all newly hired employees. Upon authorization to use the program, a public employer must permanently post on the employer’s website the employer’s federally issued user ID number and date of authorization. Alternatively, the employer may submit the ID number to the Carl Vinson Institute at the University of Georgia to post on its local government audit and budget website. O.C.G.A. § 13-10-91(a).

The Georgia Attorney General is authorized to conduct an investigation and bring any criminal or civil action necessary to ensure employer compliance. The Attorney General will provide an employer who has committed a good faith violation of these compliance terms 30 days to demonstrate that the employer has come into compliance. The governor has also created

an Immigration Enforcement Review Board within the Georgia Department of Audits and Accounts. The Board is tasked with investigating complaints that local government officials and employers are not enforcing the state's immigration laws. O.C.G.A. § 50-36-3.

A public employer cannot enter into a contract for services unless the contractor registers and participates in E-Verify. Before a public employer considers a bid for performance of services, the bid shall include a signed, notarized affidavit from the contractor (1) attesting that the contractor uses E-Verify, (2) attesting to the user ID number and date of authorization of the contractor, (3) attesting that the contractor will continue to use E-Verify, and (4) attesting that the contractor will contract only with subcontractors who present an affidavit to the contractor with the same information required by (1)-(3). O.C.G.A. § 13-10-91(b)(2); *see also* O.C.G.A. § 13-10-90(4).

A subcontractor will not be allowed to enter into any contract with a contractor unless the subcontractor also participates in E-Verify. The contractor has the responsibility of submitting copies of all affidavits and identification cards required of subcontractors to the public employer within five business days of receipt. O.C.G.A. § 13-10-91(b).

If the contractor or subcontractor does not have any employees, that contractor may instead provide a copy of the contracting party's state-issued driver's license or state-issued identification card. O.C.G.A. § 13-10-91(b)(5).

A public employer must also submit a yearly compliance report to the state auditor. The report must contain (1) the employer's E-Verify user number; (2) the date of authorization; (3) the legal name, address, and E-Verify user number of the contractor; and (4) the date of the contract between the contractor and employer. O.C.G.A. § 13-10-91(b)(7).

## 2. Private Employers

Every private employer in Georgia with more than 10 employees must register with and use E-Verify for new hires. O.C.G.A. § 36-60-6.

## 3. E-Verify and Business Licenses

Before any county or municipal corporation issues or renews a business license, occupational tax certificate, or other document required to operate a business, recipients must provide evidence that they are authorized to use the E-Verify program or evidence that the provisions of the Act do not apply (an affidavit). The number of employees, for the purposes of the statute, will be determined by the number of employees on January 1 of the year in which the affidavit is submitted. O.C.G.A. § 36-60-6(d).

## 4. Human Trafficking

Georgia recognizes the offenses of human trafficking and contributing to human trafficking. O.C.G.A. § 16-5-46. “A person commits the offense of trafficking a person for labor servitude when that person knowingly subjects another person to or maintains another in labor servitude or knowingly recruits, entices, harbors, transports, provides, or obtains by any means another person for the purpose of labor servitude.” O.C.G.A. § 16-5-46(b). The Georgia human trafficking language is similar to federal statutory language. Penalties for violations of the law include 1-20 years, and 10-20 years if the victim is under the age of 18.

## 5. Prohibit Tax Benefits

Undocumented employee compensation over \$600 per year may not be used as an allowable business expense. O.C.G.A. § 48-7-21.1(b) The law only applies to those hired after January 1, 2008 and the provision becomes effective on that date. *Id.* The Georgia Department of Revenue is authorized to promulgate rules and regulations regarding this statute. O.C.G.A. § 48-7-21.1(g).

### D. Right to Work Laws

“It shall be unlawful for any person, acting alone or in concert with one or more other persons, to compel or attempt to compel any person to join or refrain from joining any labor organization or to strike or refrain from striking against his will by any threatened or actual interference with his person, immediate family, or physical property or by any threatened or actual interference with the pursuit of lawful employment by such person or by his immediate family.” O.C.G.A. § 34-6-6. Any person who violates this section shall be guilty of a misdemeanor. *See* O.C.G.A. § 34-6-7.

### E. Lawful Off-Duty Conduct (Including Lawful Marijuana Use)

Employers may encourage their employees to be mindful of their behavior even when off-duty and may attempt to step in when an employee’s off-duty conduct is illegal or violates workplace rules, although an employer may not always be successful in doing so. *See Prof’l Standards Comm’n v. Peterson*, 284 Ga. App. 424 (2007) (affirming superior court in finding Professional Standards Commission’s sanctioning of two schoolteachers clearly erroneous where teachers were accused of violating the Code of Ethics for Educators and other workplace standards by hosting a party for their high school daughter where underage drinking allegedly occurred).

Marijuana use remains illegal in Georgia. *See* O.C.G.A. § 16-13-30. However, Georgia recently enacted a statute permitting the use of marijuana for medical purposes under limited circumstances. O.C.G.A. § 16-12-191. With respect to the employment context, the statute states:

Nothing in this article shall require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana

in any form, or to affect the ability of an employer to have a written zero tolerance policy prohibiting the on-duty, and off-duty, use of marijuana, or prohibiting any employee from having a detectable amount of marijuana in such employee's system while at work.

O.C.G.A. § 16-12-191(f).

F. Gender/Transgender Expression

Georgia statutory law does not currently address the issue of gender/transgender expression in the workplace. However, the City of Atlanta passed a local ordinance protecting against discrimination based on sexual orientation in 2000. This ordinance has since been expanded to include protection from discrimination based on gender identity, domestic relationship status, parental status, and familial status, as well. In addition, the new ordinance significantly expands the scope of unlawful disability discrimination by including within the law's protection those persons who would be disabled but for the use of a mitigating measure or medication.

Coverage includes all private employers with 10 or more workers, but does not include any municipal, county, state, or federal governmental entity. Since the term "employees" is defined to include "traditional" workers, temporary workers, part-time workers, and applicants, most private employers satisfy the 10-employee jurisdictional limitation. ATLANTA CODE OF ORDINANCES, Ch. 94, Art. 11, § 94-11; ATLANTA CODE OF ORDINANCES, Subpart A, Bill of Rights, § 4. Practitioners should note that although the remedies available are similar to federal legislation, the ordinance does not include caps on damages.

In 2018, the City of Doraville followed suit by expanding its LGBTQ protections to private employers as well, and in the spring of 2019, the City of Clarkston became the third locality with these types of broad protections. Furthermore, at least 35 Georgia localities provide protection from sexual orientation discrimination in *public* employment by local ordinance or personnel policy.

G. Other Key State Statutes

1. Safe Workplace Requirements

Employers must furnish employment which shall be reasonably safe for employees, use safety devices and safeguards, adopt and use methods and processes reasonably adequate to render employment and place of employment safe, and do every other thing reasonably necessary to protect the life, health, safety, and welfare of employees. O.C.G.A. §§ 34-2-10, 34-7-20. An employer must use ordinary care in selecting employees and not retain them after knowledge of incompetency. O.C.G.A. § 34-7-20. Similarly, an employer must use like care in furnishing machinery equal in kind to that in general use and that is reasonably safe for all persons who operate it with ordinary care and diligence. If there are latent defects in machinery or dangers incident to employment, which defects or dangers the employer knows or ought to

know but which are unknown to employees, the employer must give employees warning with respect thereto. O.C.G.A. § 34-7-20. Employers must construct, repair, and maintain facilities so as to render the facilities reasonably safe. O.C.G.A. § 34-2-10.

The Georgia Workers' Compensation Act provides an employee's exclusive remedy for his claim that his employer failed to provide a safe work environment. *See* O.C.G.A. § 34-9-11(a); *S. Wire and Iron, Inc. v. Fowler*, 124 S.E.2d 738, 217 Ga. 727 (1962); *Jones v. Macon Soils, Inc.*, 606 S.E.2d 316, 270 Ga. App. 298 (2004); *DeKalb Collision Ctr., Inc. v. Foster*, 562 S.E.2d 740, 254 Ga. App. 477 (2002); *Kellogg Co. v. Pinkston*, 558 S.E.2d 423, 253 Ga. App. 190 (2001). However, as the law currently stands, a non-physical injury alone is not compensable under the Act. *Betts v. MedCross Imaging Ctr., Inc.*, 542 S.E.2d 611, 246 Ga. App. 873 (2000); *Columbus Fire Dep't/Columbus Consol. Gov't v. Ledford*, 523 S.E.2d 58, 240 Ga. App. 195 (1999); *accord Miraliakbari v. Pennicooke*, 561 S.E.2d 483, 254 Ga. App. 156 (2002) (holding that Workers' Compensation Act does not provide sole remedy for claim of intentional infliction of emotional distress).

In the context of workers' compensation, the analysis of whether an employee's injuries are compensable under the Act and whether the Act's exclusive remedy provision bars a cause of action is not the same: "[A]n injury may not be compensable under the Act yet be considered to be within its 'purview' so as to bar related claims." *Lewis v. Northside Hosp., Inc.*, 599 S.E.2d 267, 269, 267 Ga. App. 288 (2004) (holding that although the plaintiff's non-physical injuries were not compensable under the Act, the exclusive remedy provision still barred her claims for assault and battery and intentional infliction of emotional distress).

All owners and occupiers of land in Georgia have a duty to exercise ordinary care in keeping their premises and approaches of their property safe. O.C.G.A. § 51-3-1. This law has been interpreted to address harm caused by physical defects and by other individuals on the premises. *Robinson v. Kroger Co.*, 493 S.E.2d 403, 268 Ga. 735 (1997); *Sutton v. Sutton*, 243 S.E.2d 310, 145 Ga. App. 22 (1978); *Ga. Bowling Enters., Inc. v. Robbins*, 119 S.E.2d 52, 103 Ga. App. 286 (1961).

When an individual sues a property owner for violent acts by third parties, whether it was reasonably foreseeable that the individual would be injured by the criminal or malicious acts is central to a finding of liability. *See Razdan v. Parzen*, 278 S.E.2d 687, 157 Ga. App. 848 (1981) (tenant sued for negligence of landlord's employee). In measuring foreseeability, courts look for evidence of substantially similar prior incidents. *See Yager v. Wal-Mart Stores, Inc.*, 570 S.E.2d 650, 257 Ga. App. 215 (2002) (no evidence of prior similar acts pointing to supervisor's knowledge that water gun would be removed from packaging, filled with water, and shot at other business invitees); *Walker v. Sturbridge Partners, Ltd.*, 470 S.E.2d 738, 221 Ga. App. 36 (1996), *aff'd*, 482 S.E.2d 339, 267 Ga. 785 (1997) (landlord's knowledge of two prior burglaries made it reasonable for the landlord to anticipate another unauthorized entry which could result in personal harm to the tenant).

## 2. Obligations Regarding Breastfeeding

An employer “may provide reasonable unpaid break time each day to an employee who needs to express breast milk for her infant child. The employer may make reasonable efforts to provide a room or other location (in close proximity to the work area), other than a toilet stall, where the employee can express her milk in privacy.” O.C.G.A. § 34-1-6(b). If possible, the break time should run concurrently with any break time already provided to the employee. An employer is not required to provide break time if to do so would unduly disrupt the operations of the employer. The statute applies to all employers that employ one or more employees, including the state and its political subdivisions. O.C.G.A. § 34-1-6(a). *See also* O.C.G.A. § 31-1-9 (“A mother may breast-feed her baby in any location where the mother and baby are otherwise authorized to be.”).

### 3. Professional Employer Organizations

A “professional employer organization” is an employee leasing company “that has established a coemployment relationship with another employer, pays the wages of the employees of the coemployer, reserves a right of direction and control over the employees of the coemployer, and assumes responsibility for the withholding and payment of payroll taxes of the coemployer.” O.C.G.A. § 34-7-6(a). A professional employer organization may collect information to evaluate costs, obtain insurance coverage such as life, accident and workers’ compensation, establish retirement plans and other types of employee benefits, and discuss such benefits with prospective coemployers and their employees. In addition, a professional employer organization must comply with the requirements for an employee leasing company under O.C.G.A. § 34-8-32, including the surety bond requirement under O.C.G.A. § 34-8-172, and the requirements for an employee unit under O.C.G.A. § 34-8-34.

Coemployers shall retain “sufficient direction and control over the employees involved in a coemployment relationship as is necessary to conduct its business operations and fulfill its obligations to such employees.” O.C.G.A. § 34-7-6(c). Coemployers are the sole employers of such employees for licensing purposes, unless otherwise agreed to in writing. Both professional employer organizations and their coemployer clients are entitled to exclusive remedy under the workers’ compensation statute. O.C.G.A. § 34-7-6(d).

### 4. AIDS Discrimination

Although employment discrimination on the basis of AIDS is not mentioned in Georgia’s law on AIDS confidentiality, the law prohibits disclosure of the results of AIDS-virus tests, except in limited circumstances. The relevant law is codified at O.C.G.A. § 24-12-21.

### 5. Workers’ Compensation and Unemployment Compensation

Changes to the Workers’ Compensation Subsequent Injury Trust Fund became effective on May 10, 2005. The amended statute provides that the Subsequent Injury Trust Fund “shall not reimburse a self-insured employer or an insurer for a subsequent injury for which a claim is

made for an injury occurring after June 30, 2006.” O.C.G.A. § 34-9-368(a). For those injuries occurring on or before June 30, 2006, the Fund will continue to reimburse self-insured employers and insurers for qualifying injury claims.

Effective July 1, 2005, a person who leaves an employer to accompany a spouse who has been reassigned from one military assignment to another shall not be disqualified from receiving unemployment benefits for that reason. O.C.G.A. § 34-8-194(1).

If a claim raised in an unemployment hearing between the employer and the employee is decided adversely to the employee, the employee will be collaterally estopped from bringing an employment claim alleging the same basis. *Shields v. BellSouth Adver. & Publ'g Corp.*, 545 S.E.2d 898, 273 Ga. 774 (2001).

In 2016, the Georgia Legislature passed a law providing for a five percent premium discount to qualifying employers who offer certain work based learning opportunities to students. 2016 Georgia Laws Act 356 (H.B. 402), codified at O.C.G.A. § 33-9-40.3 The employer must be certified by the State Board of Education to the State Board of Workers' Compensation as a work based learning employer, among other requirements.