Chapter 1

The Employment Relationship

1-1 THE EMPLOYMENT-AT-WILL DOCTRINE

The employment-at-will doctrine is firmly established in Georgia law. The doctrine provides that, in the absence of a contractual or statutory provision to the contrary, "[t]he employer, with or without cause and regardless of its motives may discharge the employee without liability."[1] Similarly, the employee may terminate the relationship without cause at any time. As noted in the statute, the employer's motivation is generally irrelevant.[2]

1-1:1 Statutory Codification: O.C.G.A. § 34-7-1

There is a statutory presumption that, in the absence of a contractual provision to the contrary or some statutory exception, employment is terminable at the will of either party.

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1. *Jellico v. Effingham Cnty.*, 221 Ga. App. 252, 253, 471 S.E.2d 36, 37 (1996) (citation and punctuation omitted); *Brathwaite v. Fulton-DeKalb Hosp. Auth.*, 317 Ga. App. 111, 117, 729 S.E.2d 625, 630 (2012) ("The bar to wrongful discharge claims where the employment is at-will 'is a fundamental statutory rule governing employer-employee relations in Georgia.'") (quoting *Reilly v. Alcan Aluminum Corp.*, 272 Ga. 279, 528 S.E.2d 238 (2000)); *Lane v. K-Mart Corp.*, 190 Ga. App. 113, 113, 378 S.E.2d 136, 137 (1989) (noting that "an employer is free to discharge an employee at will for any reason or no reason, and . . . the employer's motives in discharging such an employee are legally immaterial"); *Jacobs v. Ga.-Pac. Corp.*, 172 Ga. App. 319, 320, 323 S.E.2d 238, 239 (1984) ("The rule in Georgia remains hard and fast that an employer is free to discharge an employee at will for any or no reason, and that the employer's motives in discharging such an employee are legally immaterial.").

2. *Reid v. City of Albany*, 276 Ga. App. 171, 171-72, 622 S.E.2d 875, 877 (2005) ("The motivation underlying the termination usually does not matter; an employer may discharge an at-will employee without liability."); *Hightower v. Kendall Co.*, 225 Ga. App. 71, 483 S.E.2d 294 (1997). *But see* Section 1-1:7 below (addressing effect of statutory prohibitions on discriminatory and retaliatory conduct) and Chapter 5 below (Employment Discrimination and Retaliation).

> If a contract of employment provides that wages are payable at a stipulated period, the presumption shall arise that the hiring is for such period, provided that, if anything else in the contract indicates that the hiring was for a longer term, the mere reservation of wages for a lesser time will not control. An indefinite hiring may be terminated at will by either party.[3]

1-1:2 Presumption of At-Will Employment

1-1:2.1 Effect of Wage Term or Period

A provision that wages are to be paid for a stipulated period raises a presumption that the employment term is for that period.[4] For example, a contract providing for the payment of a fixed salary per month raises the presumption that the employee was hired for one month, after which the employment would become terminable at will.[5] Note, however, that a contract that specifies an annual salary typically is not sufficient to raise a presumption that the hiring was for a one-year period.[6]

The contract may specify a period of employment beyond the wage term. For example, where a contract specified that employment was "for a period of not less than three years," it established a definite period of employment that was not terminable at will.[7] The term, however, must be sufficiently definite. For example, alleged agreements for "lifetime" employment or employment until the employer becomes insolvent have been held too indefinite to overcome the presumption of at-will employment.[8] If the contract not only provides for payment of wages for a certain period of time but also contains a longer term, the longer term will

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3. O.C.G.A. § 34-7-1.

4. O.C.G.A. § 34-7-1.

5. *Burton v. John Thurmond Constr. Co.*, 201 Ga. App. 10, 10, 410 S.E.2d 137, 138 (1991).

6. *Ikemiya v. Shibamoto Am., Inc.*, 213 Ga. App. 271, 274, 444 S.E.2d 351, 353 (1994); *Gatins v. NCR Corp.*, 180 Ga. App. 595, 597, 349 S.E.2d 818, 820 (1986) ("The computation of the salaries on an annualized basis does not turn this compensation term into a duration term.").

7. *Wojcik v. Lewis*, 204 Ga. App. 301, 302, 419 S.E.2d 135, 135-36 (1992).

8. *Land v. Delta Air Lines*, 130 Ga. App. 231, 232, 203 S.E.2d 316, 318 (1973); *Barker v. CTC Sales Corp.*, 199 Ga. App. 742, 743, 406 S.E.2d 88, 89 (1991).

control.[9] A contract may also create a longer term by specifying that employment is to run through the completion of a certain task or project.[10]

1-1:2.2 Public Employees

The presumption of at-will employment generally applies to both public and private employees.[11] A public employee has no property right in continued employment.[12] A public employee, however, has a property right interest in his or her job whenever the employee may be dismissed for cause.[13]

1-1:3 Typically No Cause of Action for Wrongful Termination

Wrongful termination "is a tortious act growing out of the breach of the employment contract."[14] In the absence of any contractual or statutory provision to the contrary, an at-will employee has no claim for wrongful discharge against his or her former employer.[15]

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[9] O.C.G.A. § 34-7-1; *Mail Advert. Sys., Inc. v. Shroka*, 249 Ga. App. 484, 485-86, 548 S.E.2d 461, 463 (2001) (contract not only stated a two-week pay period but also stated it would run for a three-month period).

[10] *Pickle Logging, Inc. v. Ga. Pac. Corp.*, 276 Ga. App. 398, 401, 623 S.E.2d 227, 230 (2005) ("A jury issue on whether a contract is terminable at will may be created by evidence that the parties agreed to continue an employment relationship through completion of a particular project.").

[11] *Zimmerman v. Cherokee Cnty.*, 925 F. Supp. 777, 781 (N.D. Ga. 1995).

[12] *Barnes v. Mendonsa*, 110 Ga. App. 464, 465, 138 S.E.2d 914, 915 (1964) ("Generally, one in public employment has no vested right to such employment, and, generally, the power to appoint carries with it the power to remove."); *see also O'Connor v. Fulton Cnty.*, 302 Ga. 70, 74, 805 S.E.2d 56, 60 (2017).

[13] *Wayne Cnty. v. Herrin*, 210 Ga. App 747, 755, 437 S.E.2d 793, 801 (2002); *Robins Fed. Credit Union v. Brand*, 234 Ga. App. 519, 520-21, 507 S.E.2d 185, 187 (1998); *Maxwell v. Mayor & Aldermen of Savannah*, 226 Ga. App. 705, 707, 487 S.E.2d 478, 482 (1997); *Brownlee v. Williams*, 233 Ga. 548, 555, 212 S.E.2d 359, 364 (1975).

[14] *Mr. B's Oil Co. v. Register*, 181 Ga. App. 166, 167, 351 S.E.2d 533, 534 (1986).

[15] *Balmer v. Elan Corp.*, 261 Ga. App. 543, 544-45, 583 S.E.2d 131, 133 (2003), *aff'd*, 278 Ga. 227, 233, 599 S.E.2d 158, 164 (2004) ("[U]nless our General Assembly has created a specific exception to O.C.G.A. § 34-7-1, an at-will employee has no viable state remedy in the form of a tort action for wrongful discharge against his or her former employer."); *Mattox v. Yellow Freight Sys., Inc.*, 243 Ga. App. 894, 894, 534 S.E.2d 561, 562 (2000) ("An at-will employee can be terminated for any reason and may not generally recover from the employer for wrongful discharge."); *Jellico v. Effingham Cnty.*, 221 Ga. App. 252, 253, 471 S.E.2d 36, 37 (1996) (same); *Borden v. Johnson*, 196 Ga. App. 288, 289, 395 S.E.2d 628, 628-29 (1990) (same).

1-1:4 Public Policy Exceptions Limited

In the absence of a specific statutory provision, Georgia courts typically will not create "public policy" exceptions to the at-will doctrine.[16] For example, the Court of Appeals refused to create a public policy exception to the at-will doctrine for an employee who was allegedly discharged in retaliation for exercising his rights under the Worker's Compensation Act.[17] Similarly, the Court of Appeals refused to create a "constructive wrongful termination" exception where an at-will county building inspector alleged he was compelled to resign when he learned his supervisor was certifying as habitable buildings the inspector had refused to certify.[18]

1-1:5 Promissory Estoppel and Fraud Claims

Where the underlying employment relationship is terminable at will, promissory estoppel and fraud claims typically will not succeed. For instance, the Court of Appeals held that an employee's fraud claim alleging failure to promote him on the basis of seniority was not actionable since his employment contract was for an indefinite term and was terminable at will.[19] Similarly, a party cannot maintain a claim for promissory estoppel when the underlying promise is for at-will employment.[20]

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16. *Balmer v. Elan Corp.*, 261 Ga. App. 543, 544, 583 S.E.2d 131, 133 (2003), *aff'd,* 278 Ga. 227, 233, 599 S.E.2d 158, 163-64 (2004); *Eckhardt v. Yerkes Reg'l Primate Ctr.*, 254 Ga. App. 38, 39, 561 S.E.2d 164, 166 (2002) (noting that a public policy exception allowing former employee to recover on claim of wrongful termination for whistleblowing has not been established by the legislature); *Jellico v. Effingham Cnty.*, 221 Ga. App. 252, 253, 471 S.E.2d 36, 38 (1996) (noting that "[t]he courts of this state have consistently held that they will not usurp the legislative function and, under the rubric that they are the propounders of 'public policy,' undertake to create exceptions to the legal proposition that there can be no recovery in tort for the alleged 'wrongful' termination of the employment of an at-will employee. That the courts of other jurisdictions may have done so is of no consequence . . .").

17. *Evans v. Bibb Co.*, 178 Ga. App. 139, 139, 342 S.E.2d 484, 485 (1986).

18. *Jellico v. Effingham Cnty.*, 221 Ga. App. 252, 252, 471 S.E.2d 36, 37 (1996).

19. *Murphine v. Hosp. Auth. of Floyd Cnty.*, 151 Ga. App. 722, 723, 261 S.E.2d 457, 458 (1979) ("[T]he contract was for an indefinite term and was terminable at will; and, . . . in these circumstances, no claim for failure to promote can be maintained."); *see also Ely v. Stratoflex, Inc.*, 132 Ga. App. 569, 572, 208 S.E.2d 583, 585 (1974) ("The oral promises could not be enforced because the underlying employment contract, being terminable at will, is unenforceable.").

20. *Simpson Consulting, Inc. v. Barclays Bank PLC*, 227 Ga. App. 648, 490 S.E.2d 184 (1997) ("In the case sub judice, as a matter of Georgia public policy, appellants have no cause of action under the Georgia equity doctrine of promissory estoppel as to any alleged contracts terminable at will."); *Johnson v. MARTA*, 207 Ga. App. 869, 429 S.E.2d 285 (1993) ("The doctrine of promissory estoppel codified at O.C.G.A. § 13-3-44(a) has no application to enforce executory promises pertaining to employment for an indefinite

1-1:6 Employee vs. Independent Contractor

In determining whether one is acting for another as an independent contractor or an employee, Georgia courts consider the following factors set forth in the Restatement (Second) of Agency: (1) the extent of control which, by agreement, the employer may exercise over the details of the work; (2) whether or not the one employed is engaged in a distinct occupation or business; (3) whether or not the work to be performed is usually done under the direction of the employer or by a specialist who needs no supervision; (4) the skill required in the particular occupation; (5) whether the employer supplies the tools and the place of work for the one employed; (6) the length of time for which the person is employed; (7) the method of payment, whether by the time or by the job; (8) whether or not the work to be performed is a part of the regular business of the employer; (9) whether or not the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business.[21]

1-1:7 Effect of Federal and State Antidiscrimination Laws

The doctrine of at-will employment applies to contract or tort claims arising from an employment relationship. It creates a default rule that, absent an agreement to the contrary, either party to the employment contract may terminate the relationship at will. But federal and state antidiscrimination laws stand independently

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term."); *Jones v. Destiny Indus. Inc.*, 226 Ga. App. 6, 485 S.E.2d 225 (1979) ("Promissory estoppel has no application in the instant case where the promise relied on, if any, was for employment or an agency relationship for an indefinite period of time."). *Cf. Thompson v. Floyd*, 310 Ga. App. 674, 683, 713 S.E.2d 883, 891 (2011) (reversing summary judgment on promissory estoppel claim where claim was not based on a breached promise of employment for an indefinite term but on alleged promise to pay plaintiff for successfully closing a sale).

21. *Murphy v. Blue Bird Body Co.*, 207 Ga. App. 853, 854-55, 429 S.E.2d 530, 532 (1993) (citing *Moss v. Cent. of Ga. R. Co.*, 135 Ga. App. 904, 906, 219 S.E.2d 593, 596 (1975) (Restatement (Second) of Agency, § 220(2)); *see also Royal v. Ga. Farm Bureau Mut. Ins. Co.*, 333 Ga. App. 881, 883, 777 S.E.2d 713, 715 (2015) ("The test is whether the employer, under the contract, whether oral or written, has the right to direct the time, the manner, the methods, and the means of the execution of the work . . . The right to control the manner and method means the right to tell the employee how he shall go about doing the job in every detail, including what tools he shall use and what procedures he shall follow."); *RBF Holding Co. v. Williamson*, 260 Ga. 526, 526, 397 S.E.2d 440, 441 (1990) (finding injured worker to be an independent contractor where evidence showed that the company did not have the right to control the time, method, and manner of the work, the worker started and finished jobs at his own schedule, the worker refused jobs when it conflicted with his full-time job or with personal plans, the worker used his own tools in performing work for the company, and that as long as he got the work done, the company did not care how he did it).

from such claims. Even at-will employees are entitled to protection from statutorily prohibited discrimination or retaliation.[22]

1-2 CONTRACTS

1-2:1 Statute of Frauds

Under the Statute of Frauds, an agreement that is not to be performed within one year from the making of the agreement must be in writing.[23] The Statute of Frauds does not inhibit an oral employment contract for an indefinite term.[24] Contracts for a period of employment longer than one year, however, are subject to the Statute of Frauds and must be in writing to be enforceable.[25] Note that an employee's entry into and partial performance of work does not remove the contract from the Statute of Frauds under the doctrine of partial performance.[26]

1-2:2 Employee Handbooks and Manuals

Employee handbooks serve a variety of useful purposes, including providing employees notice of relevant workplace rules, policies, procedures, and benefit information. Attempts to use

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22. *Nix v. WLCY Radio/Rahall Commc'ns*, 738 F.2d 1181, 1184 (11th Cir. 1984) (explaining that an "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, *as long as its action is not for a discriminatory reason*") (emphasis added); *Borden v. Johnson*, 196 Ga. App. 288, 289, 395 S.E.2d 628, 629 (1990) ("It has been recognized that an employer's immunity from liability for discharge of an at-will employee 'may not apply to discharge for a reason that is impermissible on grounds of public policy, such as a discharge based upon race'") (quoting *A.L. Williams & Assoc. v. Faircloth*, 259 Ga. 767, 769 n.4, 386 S.E.2d 151, 154 n.4 (1989)). *See also* Chapter 5 below (Employment Discrimination and Retaliation).

23. O.C.G.A. § 13-5-30(5).

24. *Guinn v. Conwood Corp.*, 185 Ga. App. 41, 42, 363 S.E.2d 271, 272 (1987); *Wood v. Dan P. Holl & Co.*, 169 Ga. App. 839, 841, 315 S.E.2d 51, 53 (1984) ("[A]n oral employment contract terminable at will is not inhibited by the Statute of Frauds.").

25. *American Standard, Inc. v. Jessee*, 150 Ga. App. 663, 664, 258 S.E.2d 240, 243 (1979); *Grace v. Roan*, 145 Ga. App. 776, 777, 245 S.E.2d 17, 18 (1978) ("Appellant's petition shows on its face that the alleged contract of employment was for a period longer than one year. The petition therefore affirmatively shows that the contract was not for one year and was subject to attack as being within the Statute of Frauds."); *Metzger v. Reserve Ins. Co.*, 149 Ga. App. 404, 404, 254 S.E.2d 517, 517 (1979).

26. *Utica Tool Co. v. Mitchell*, 135 Ga. App. 635, 637, 218 S.E.2d 650, 652 (1975) ("The mere fact he entered upon employment and served would not avail as part performance . . . The part performance required to obviate the Statute of Frauds must be substantial and essential to the contract and which results in a benefit to one party and a detriment to the other."); *see also Hudson v. Venture Indus., Inc.*, 147 Ga. App. 31, 32, 248 S.E.2d 9, 10 (1978), *aff'd*, 243 Ga. 116, 119-20, 252 S.E.2d 606, 607-08 (1979); *Grace v. Roan*, 145 Ga. App. 776, 777-78, 245 S.E.2d 17, 18-19 (1978).

handbook provisions to alter the at-will relationship have been unsuccessful. For example, where an employee manual stated "you can be terminated only under the conditions of the Code of Good Conduct," the Court of Appeals nevertheless held that it did not view the manual as establishing a contract and that, even if it did, the employment relationship remained terminable at will because the manual did not specify a period of employment.[27]

Typically, a handbook will include a provision stating that it does not create an express or implied contract or alter the at-will nature of the employment. Such provisions are generally viewed as additional evidence of the at-will nature of the employment.[28]

A handbook or manual provision, however, may give rise to a claim for benefits under general principles of contract law. The Court of Appeals has held that "[i]t is the accepted law of this state that an additional compensation plan offered by an employer and impliedly accepted by an employee, by remaining in employment, constitutes a contract between them, whether the plan is public or private, and whether or not the employee contributes to the plan."[29]

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27. *Georgia Ports Auth. v. Rogers*, 173 Ga. App. 538, 539, 327 S.E.2d 511, 512 (1985); *see also Lane v. K-Mart Corp.*, 190 Ga. App. 113, 114, 378 S.E.2d 136, 137 (1989) ("The fact that [appellant] had notice of certain [of appellee K-Mart's] policies and procedures regarding discipline and termination of employees which [he] alleges were not followed in [his] discharge would not give rise to an action for wrongful termination."); *Garmon v. Health Grp. of Atlanta*, 183 Ga. App. 587, 589, 359 S.E.2d 450, 452 (1987); *Swanson v. Lockheed Aircraft Corp.*, 181 Ga. App. 876, 883, 354 S.E.2d 204, 210 (1987) (holding that a manual's list of terminable infractions was for illustrative purposes only and did not alter the at-will nature of the employment); *Murphine v. Hosp. Auth. of Floyd Cnty.*, 151 Ga. App. 722, 723, 261 S.E.2d 457, 458 (1979) (employer's establishment of grievance procedure did not change the at-will nature of the employment relationship); *Hill v. Delta Air Lines*, 143 Ga. App. 103, 105, 237 S.E.2d 597, 599 (1977) ("open door" policy did not alter the at-will nature of the employment relationship).

28. *See, e.g., Doss v. City of Savannah*, 290 Ga. App. 670, 673, 660 S.E.2d 457, 460 (2008) (where handbook stated that it did not "constitute an expressed or implied contract" and noted that an employee "may separate from his/her employment at any time; the [employer] reserves the right to do the same," it was a clear statement of an at-will employment relationship).

29. *Fletcher v. Amax, Inc.*, 160 Ga. App. 692, 695, 288 S.E.2d 49, 51 (1981). *See also Georgia Ports Auth. v. Rogers*, 173 Ga. App. 538, 540, 327 S.E.2d 511, 513 (1985) (holding in part that "[a]ppellee, by remaining in employment with appellant, became entitled to the payment of 13 weeks' occupational accident leave plus accumulated paid sick and non-occupational leave benefits, conditioned upon fulfillment of the language in the manual"); *Runyan v. Econ. Lab., Inc.*, 147 Ga. App. 53, 55, 248 S.E.2d 44, 46-47 (1978) (addressing severance pay provision in employee manual).

1-2:3 Employment Contracts

Employment contracts, particularly those for employees in positions with greater bargaining power may include "for cause" provisions or similar requirements such as an advance notice of termination requirement. In such cases, and regardless of the at-will doctrine, a party who breaches a provision may be liable for breach of contract.[30]

1-3 LABOR RELATIONS

Although the primary focus of this book is on employment law, a brief overview of some of Georgia's laws regarding labor relations is in order. Georgia has a number of "right to work" statutes. An individual cannot be required to join or resign from a labor organization as a condition of employment.[31]

Similarly, any provision in a contract between an employer and a labor organization that requires "as a condition of employment or continuance of employment that any individual be or remain a member or an affiliate of a labor organization or that any individual pay any fee, assessment, or other sum of money whatsoever to a labor organization is declared to be contrary to the public policy of this state; and any such provision in any such contract heretofore or hereafter made shall be absolutely void."[32] It is "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

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30. *Jones v. Hous. Auth. of Fulton Cnty.*, 315 Ga. App. 15, 18-19, 726 S.E.2d 484, 487 (2012) (discussing "for cause" termination provision); *Marcre Sales Corp. v. Jetter*, 223 Ga. App. 70, 71, 476 S.E.2d 840, 841 (1996) (where employment agreement stated it would automatically renew from year to year unless either party gave written notice of intention to terminate in the manner set forth in the agreement and did not contain severability clause, employer's breach of the notification requirement excused employee's compliance with restrictive covenants); *Gram Corp. v. Wilkinson*, 210 Ga. App. 680, 680, 437 S.E.2d 341, 342 (1993) (affirming finding that employer breached a written contract to employ employee as its office manager for ten years by prematurely terminating her employment).

31. O.C.G.A. § 34-6-21(a).

32. O.C.G.A. § 34-6-23.

pursuit of lawful employment by such person or by his immediate family."[33]

No labor organization and no local union may call or cause any strike, slowdown, or stoppage of work until after 30 days' written notice is given by the labor organization or local union to the employer, stating the intention to call the strike, slowdown, or stoppage of work and giving the reasons therefore.[34] Georgia law also regulates picketing, interference with the employer's business, and assemblage at or near the place of a labor dispute.[35] Violation of various labor statutes is punishable as a misdemeanor.[36] Note, however, that certain sections of Georgia's labor laws have been held to be preempted by the National Labor Relations Act[37] (NLRA) and therefore unenforceable.[38]

1-4 ARBITRATION PROVISIONS IN THE EMPLOYMENT CONTEXT

1-4:1 Coverage Under Georgia Arbitration Code vs. United States Arbitration Act

Section 1 of the United States Arbitration Act, commonly referred to as the Federal Arbitration Act ("FAA"),[39] excludes from its coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[40] The United States Supreme Court has held that this third exclusion is limited to transportation workers

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33. O.C.G.A. § 34-6-6.

34. O.C.G.A. § 34-6-1(b).

35. O.C.G.A. §§ 34-6-3; 34-6-4; 34-6-5.

36. O.C.G.A. § 34-6-7 ("Any person who violates any provision of Code Sections 34-6-2 through 34-6-6 shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished as provided in Code Section 17-10-3.").

37. 49 Stat. 449 (July 5, 1935); 29 U.S.C. §§ 151 *et seq*.

38. *Georgia State AFL-CIO v. Olens*, 194 F. Supp. 3d 1322, 1324-25 (2016) (Order) (holding that the following Georgia provisions are preempted by the NLRA: O.C.G.A. §§ 34-6-21(d) ("[n]o employer or labor organization shall be forced to enter into any agreement, contract, understanding, or practice . . . that subverts the established process by which employees may make informed and free decisions regarding representation and collective bargaining rights provided for by federal labor laws"); 34-6-25(a) (addressing wage deductions fees or other sums to labor organizations); and 34-6-26(a) (making it unlawful for employers and labor organizations to contract for such a deduction from wages)).

39. Federal Arbitration Act, 43 Stat. 883 (Feb. 12, 1925).

40. 9 U.S.C. §§ 1 *et seq*.

actually engaged in interstate commerce.[41] The class of employees outside the coverage of the FAA is limited. The FAA preempts any state law that conflicts with its provisions or undermines the enforcement of private arbitration agreements.[42]

1-4:2 Georgia Arbitration Code

1-4:2.1 Statutory Exclusions

The Georgia Arbitration Code ("GAC")[43] contains a number of statutory exclusions. Of relevance to this book are the exclusion for any collective bargaining agreements between employers and labor unions representing employees of such employers and any contract relating to terms and conditions of employment unless the clause agreeing to arbitrate is initialed by all signatories at the time of the execution of the agreement.[44] Note that except for the narrow class of employees excluded from FAA coverage, the initialing requirement is preempted by the FAA.[45] In *Kindred Nursing Centers Ltd. Partnership v. Clark*,[46] however, the United States Supreme Court held that Kentucky "failed to put arbitration agreements on an equal footing with other contracts."

1-4:2.2 Compelling Arbitration

Under the GAC, a party aggrieved by the failure of another to arbitrate may apply for a court order compelling arbitration.[47] The GAC also contains a demand provision that requires a party served

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41. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 136, 121 S. Ct. 1302, 1320, 149 L. Ed. 2d 236, 260 (2001).

42. *Davidson v. A.G. Edwards & Sons, Inc.*, 324 Ga. App. 172, 173, 748 S.E.2d 302, 302 (2013); *Results Oriented v. Crawford*, 245 Ga. App. 432, 436, 538 S.E.2d 73, 78 (2000); *see also Volt Info. Scis. v. Bd. of Trs.,* 489 U.S. 468, 477, 109 S. Ct. 1248, 1255, 103 L. Ed. 2d 488, 499 (1989) ("[T]o the extent that [state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," it will be preempted by the FAA.).

43. O.C.G.A. § 9-9-2.

44. O.C.G.A. § 9-9-2(c)(1)-(10).

45. *Langfitt v. Jackson*, 284 Ga. App. 628, 635, 644 S.E.2d 460, 465 (2007).

46. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1429, 197 L. Ed. 2d 806, 815 (May 15, 2017) ("By requiring an explicit statement before an agent can relinquish her principal's right to go to court and receive a jury trial, the court did exactly what this Court has barred: adopt a rule hinging on the primary characteristic of an arbitration agreement." *Clark*, 137 S. Ct., at 1427).

47. O.C.G.A. § 9-9-6(a).

with such arbitration demand to move for a stay within 30 days or else be precluded from challenging the validity of the agreement or the timeliness of the claim.[48]

1-4:2.3 Court Jurisdiction Over Applications for Attachment and Preliminary Relief

The superior court in the county in which an arbitration is pending, or, if not yet commenced, in a county specified by the statute, may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.[49]

1-4:2.4 Subpoenas

Arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents, and other evidence.[50] Such subpoenas are served and, upon application to the court by a party or arbitrator, enforced in the same manner provided for the service and enforcement of subpoenas in a civil action.[51]

1-4:2.5 Appointment of Arbitrators

If the arbitration agreement provides for a method of appointing the arbitrator or arbitrators, that method is to be followed.[52] The court may appoint one or more arbitrators if the agreement is silent on the method of appointment, if that method fails or is not followed, or if the arbitrators fail to act.[53]

1-4:2.6 Arbitration Procedure

The arbitrators have discretion to appoint a time and place for the hearing even if the arbitration agreement designates the county

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48. O.C.G.A. § 9-9-6(c)(3).
49. O.C.G.A. § 9-9-4(e).
50. O.C.G.A. § 9-9-9(a).
51. O.C.G.A. § 9-9-9(a).
52. O.C.G.A. § 9-9-7(a).
53. O.C.G.A. § 9-9-7(b).

in which the arbitration hearing is to be held.[54] The arbitrators are required to notify the parties in writing, personally or by registered or certified mail or statutory overnight delivery, no less than ten days before the hearing.[55]

The arbitrators have authority to adjourn or postpone the hearing.[56] A party may, however, move the court to direct the arbitrators to proceed promptly with the hearing and determination of the controversy.[57]

The parties are entitled "to be heard; to present pleadings, documents, testimony, and other matters; and to cross-examine witnesses."[58] Even if a party fails to appear, the arbitrators may hear and determine the controversy.[59] Parties have the right to be represented by counsel at the hearing; that right may not be waived.[60]

All of the arbitrators must conduct the hearing unless the parties agree otherwise.[61] A majority of the arbitrators, however, may determine any question and render and change an award.[62] If during the hearing, an arbitrator, for whatever reason, ceases to act, then the remaining arbitrator or arbitrators may continue with the hearing and determination.[63]

The arbitrators must maintain a record of all the pleadings, documents, testimony, and other items introduced at the hearing.[64] The arbitrators or any party may have the proceedings transcribed by a court reporter.[65]

Except as provided in O.C.G.A. § 9-9-8(c), these requirements may be waived by the parties' written consent or "by continuing with the arbitration without objection."[66]

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54. O.C.G.A. § 9-9-8(a).
55. O.C.G.A. § 9-9-8(a).
56. O.C.G.A. § 9-9-8(a).
57. O.C.G.A. § 9-9-8(a).
58. O.C.G.A. § 9-9-8(b).
59. O.C.G.A. § 9-9-8(b).
60. O.C.G.A. § 9-9-8(c).
61. O.C.G.A. § 9-9-8(d).
62. O.C.G.A. § 9-9-8(d).
63. O.C.G.A. § 9-9-8(d).
64. O.C.G.A. § 9-9-8(e).
65. O.C.G.A. § 9-9-8(e).
66. O.C.G.A. § 9-9-8(f).

1-4:2.7 Confirmation or Vacation of Award

A party—and in some cases a non-party—may apply to the court for confirmation or vacation of an arbitration award.[67]

1-5 RESTRICTIVE COVENANTS IN EMPLOYMENT AGREEMENTS

Georgia law on restrictive covenants has undergone a dramatic change in recent years. A statutory scheme went into effect that substantially altered the manner in which courts may construe and enforce such provisions. Although many employers have updated their agreements since this time, practitioners may still encounter the occasional agreement subject to the "old" law.

Although Georgia's statutory scheme for restrictive covenants has been in effect since 2011, there remains a number of unanswered questions regarding the precise application of several statutory provisions. As cases continue to work their way through the appellate system, it is expected that continued guidance will emerge.

1-5:1 Common Law or Statute

Despite initial confusion over when the statutory scheme went into effect, the issue has now been resolved. The amended code applies only to contracts entered into on or after May 11, 2011.[68]

1-5:2 Public Policy Considerations

Georgia law deems contracts "in general restraint of trade" to be against public policy and therefore unenforceable.[69] At common law, restrictive covenants would be upheld only "if they [were] strictly limited in time and territorial effect, and [were] otherwise reasonable considering the business interest of the employer sought to be protected and the effect on the employee."[70] Under the statute, however, contracts in restraint of trade are distinguished

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67. O.C.G.A. §§ 9-9-12; 9-9-13.

68. *Murphree v. Yancey Bros. Co.*, 311 Ga. App. 744, n.10, 716 S.E.2d 824 (2011); *see also Becham v. Synthes USA*, 482 Fed. App'x 387, 392 (11th Cir. 2012).

69. O.C.G.A. § 13-8-2(a)(2).

70. *Orkin Exterminating Co. v. Walker*, 251 Ga. 536, 537, 307 S.E.2d 914, 916 (1983).

from contracts "which restrict certain competitive activities, as provided in Article 4 of this chapter."[71]

1-5:3 Judicial Scrutiny

At common law, Georgia courts applied three levels of scrutiny to restrictive covenants: (1) strict scrutiny, applicable to employment contracts; (2) middle or lesser scrutiny, applicable to professional partnership agreements; and (3) much less scrutiny, which applies to sale of business agreements.[72]

Under the statutory scheme, the General Assembly has stated that "reasonable restrictive covenants contained in employment and commercial contracts serve the legitimate purpose of protecting legitimate business interests and creating an environment that is favorable to attracting commercial enterprises to Georgia and keeping existing businesses within the state."[73] While the statutory scheme makes certain distinctions between types of agreements,[74] it does not formally retain the common law's three levels of scrutiny.

1-5:4 Consideration Requirement

Typically, an employee's beginning work or continuing to work (if the agreement is executed after the employment relationship has begun) is sufficient consideration for an agreement containing a covenant not to compete.[75] Note, however, that continued employment is not sufficient consideration if the employee is already subject to an existing employment agreement.[76]

1-5:5 Judicial Modification

One of the most significant developments of the statutory scheme is the ability of the court to modify an otherwise unenforceable restriction. At common law, Georgia courts did not modify, "blue pencil," or otherwise attempt to judicially alter an otherwise

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71. O.C.G.A. § 13-8-2(a)(2).

72. *Hilb, Rogal & Hamilton Co. of Atlanta v. Holley, Inc.*, 284 Ga. App. 591, 595, 644 S.E.2d 862, 866 (2007).

73. O.C.G.A. § 13-8-50.

74. *See* Section 1-5:6, below.

75. *Glisson v. Glob. Sec. Servs., LLC*, 287 Ga. App. 640, 641-42, 653 S.E.2d 85, 87 (2007); *Thomas v. Coastal Indus. Servs., Inc.*, 214 Ga. 832, 833-34, 108 S.E.2d 328, 330 (1959).

76. *Glisson v. Glob. Sec. Servs., LLC*, 287 Ga. App. 640, 640, 653 S.E.2d 85, 86 (2007).

unenforceable provision in the employment context.[77] Moreover, courts did not sever offending provisions and enforce the rest. This led to the "void as to one, void as to all" approach under which an unenforceable covenant not to compete would render a customer non-solicitation covenant void (and vice versa).[78] Note, however, that non-disclosure and employee non-solicitation provisions are still analyzed separately at common law.[79]

Under the statute, however, "a court may modify a 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."[80] Modify "means to make, to cause, or otherwise to bring about a modification."[81] "Modification" means:

> the limitation of a restrictive covenant to render it reasonable in light of the circumstances in which it was made. Such term shall include: (A) Severing or removing that part of a restrictive covenant that would otherwise make the entire restrictive covenant unenforceable; and (B) Enforcing the provisions of a restrictive covenant to the extent that the provisions are reasonable.[82]

This statutory language has led to some confusion concerning the exact nature of the court's power to "modify" a provision. For example, is the court limited to strict "blue penciling" (merely

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77. *See, e.g., Advance Tech. Consultants, Inc. v. Roadtrac, LLC*, 250 Ga. App. 317, 320, 551 S.E.2d 735, 737 (2001); *Uni-Worth Enters., Inc. v. Wilson*, 244 Ga. 636, 640-41, 261 S.E.2d 572, 575 (1979); *Howard Schultz & Assocs. v. Broniec*, 239 Ga. 181, 185-86, 236 S.E.2d 265, 268-69 (1977). Note that at common law, courts were permitted to modify otherwise unenforceable provisions in sale of business contracts. *Advance Tech. Consultants, Inc. v. Roadtrac, LLC*, 250 Ga. App. 317, 320-21, 551 S.E.2d 735, 737-38 (2001).

78. *Uni-Worth Enters., Inc. v. Wilson*, 244 Ga. 636, 640, 261 S.E.2d 572, 575 (1979); *Adcock v. Speir Ins. Agency*, 158 Ga. App. 317, 318, 279 S.E.2d 759, 760 (1981).

79. *Mathis v. Orkin Exterminating Co., Inc.*, 254 Ga. App. 335, 337, 562 S.E.2d 213 (2002) ("We analyze [non-recruitment] clauses in employment agreements separately from non[-] solicit and non[-]compete clauses and clauses dealing with clients of the former employer."); *Sunstates Refrigerated Servs., Inc. v. Griffin*, 215 Ga. App. 61, 62, 449 S.E.2d 858 (1994) ("[T]he specific 'non[-]competition' prohibitions concerning employment and customer solicitation must be analyzed separately from those concerning disclosure of confidential business information and employee piracy [i.e., recruitment].").

80. O.C.G.A. § 13-8-53.

81. O.C.G.A. § 13-8-51(12).

82. O.C.G.A. § 13-8-51(11).

striking offending language) or can it essentially rewrite a covenant including supplying missing terms? Case law on this point is quite limited. In one case, a district court interpreted that statute to mean that while "courts may strike unreasonable restrictions, and may narrow over-broad territorial designations, courts may not completely reform and rewrite contracts by supplying new and material terms from whole cloth."[83]

1-5:6 Types of Restrictive Covenants

Restrictive covenants generally take three forms: non-compete covenants, non-solicitation covenants, and non-disclosure covenants.

1-5:6.1 Non-Compete Covenants

Covenants not to compete generally seek to bar an employee from working for a competitor for a certain amount of time in a certain geographic territory.

1-5:6.1a Common Law Requirements

At common law, the first level of analysis to be applied to a covenant not to compete is to determine the level of scrutiny to be applied.[84] Covenants ancillary to the sale of a business may be enforced "to the extent that it is found essential . . . to protect the purchaser, despite the overbreadth of the covenant."[85] On the other hand, "[a] covenant not to compete ancillary to an employment contract is enforceable only where it is strictly limited in time

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83. *LifeBrite Labs., LLC v. Cooksey*, No. 1:15-CV-4309-TWT, 2016 WL 7840217, at *7, 2016 U.S. Dist. LEXIS 181823, at *19-20 (N.D. Ga. Dec. 9, 2016); *cf. PointeNorth Ins. Grp. v. Zander*, No. 1:11-CV-3262, 2011 WL 4601028, at *3 (N.D. Ga. Sept. 30, 2011) (finding that the restrictive covenant was overbroad because it prohibited soliciting both clients with whom the employee had contact as well as anyone who had been a client of the company within the last three months of the employee's employment, but still enforceable because it could be blue-penciled by simply removing the offending language); *Kennedy v. Shave Barber Co., LLC*, 348 Ga. App. 298, 305, 822 S.E.2d 606, 612 (2018), *cert. denied*, No. S19C0624, 2019 Ga. LEXIS 611 (Sept. 3, 2019) (holding that the trial court eliminated any uncertainty in the geographic scope of a non-compete by limiting the restricted area to a three-mile radius surrounding business' current location); *Acuity Brands, Inc. v. Bickley*, No. 13-366-DLB-REW, 2017 WL 1426800, at *12 (E.D. Ky. Mar. 31, 2017) (applying Georgia law and limiting the territorial coverage from the entire United States to only the region to which employee was assigned).

84. *See* Section 1-5:3 above.

85. *White v. Fletcher/Mayo/Assocs., Inc.*, 251 Ga. 203, 205, 303 S.E.2d 746, 749 (1983) (quoting *Redmond v. Royal Ford, Inc.*, 244 Ga. 711, 261 S.E.2d 585, 587 (1979) (*per curiam*)).

and territorial effect and is otherwise reasonable considering the business interest of the employer sought to be protected and the effect on the employee."[86] The "middle level scrutiny" applied to professional partnership agreements, not surprisingly, falls somewhere in the middle of the other two standards.[87] Since this book focuses on employment law, the majority of the discussion will be devoted to agreements in the employment context.

1-5:6.1b Reasonableness of Restrictions at Common Law

Whether the restraint imposed by the employment contract is reasonable is a question of law for determination by the court.[88] The court considers "the nature and extent of the trade or business, the situation of the parties, and all the other circumstances."[89] Typically, courts will apply a three-element test that considers duration, territorial coverage, and scope of activity.[90]

While the three-element test generally involves a balancing between its factors, certain rules have emerged. The territory to be restricted must be ascertainable at the time the employee signs the agreement.[91] Similarly, the restricted territory may not exceed the territory where the employee actually worked.[92]

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86. *Howard Schultz & Assocs. v. Broniec*, 239 Ga. 181, 183, 236 S.E.2d 265, 267 (1977).

87. *See generally Physician Specialists in Anesthesia, P.C. v. MacNeill*, 246 Ga. App. 398, 402, 539 S.E.2d 216, 221 (2000).

88. *Rollins Protective Serv. v. Palermo*, 249 Ga. 138, 139, 287 S.E.2d 546, 548 (1982); *Taylor Freezer Sales v. Sweden Freezer E. Corp.*, 224 Ga. 160, 162, 160 S.E.2d 356, 538 (1968).

89. *Orkin Exterminating Co., S. Ga. v. Dewberry*, 204 Ga. 794, 803, 51 S.E.2d 669, 675 (1949), *overruled on other grounds*, *Barry v. Stanco Commc'ns Prods.*, 243 Ga. 68, 71, 252 S.E.2d 491, 494 (1979).

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

91. *Jarrett v. Hamilton*, 179 Ga. App. 422, 425, 346 S.E.2d 875, 877 (1986) (prohibition on competitive activity "within 25 miles from existing marketing areas of the Employer in the State of Georgia or any future marketing area of the Employer begun during [employee's] employment . . ." unreasonable); *Ceramic & Metal Coatings Corp. v. Hizer*, 242 Ga. App. 391, 392, 529 S.E.2d 160, 162 (2000) (provision stating "or any territory added" during the course of agreement rendered the agreement unenforceable); *AGA, LLC v. Rubin*, 243 Ga. App. 772, 774, 533 S.E.2d 804, 806 (2000) (restriction unenforceable because the territory was not determinable until the time of the employee's termination).

92. *W.R. Grace & Co., Dearborn Div. v. Mouyal*, 262 Ga. 464, 466-67, 422 S.E.2d 529, 532 (1992) ("A restriction relating to the area in which the employer does business is generally unenforceable due to overbreadth, unless the employer can show a legitimate business interest that will be protected by such an expansive geographic description."); *Peachtree Fayette Women's Specialists, LLC v. Turner*, 305 Ga. App. 60, 63-64, 699 S.E.2d 69, 72-73 (2010) (restriction invalid where it covered territory the employee never worked); *Dent*

The scope of the activities to be restricted is also an important issue. Typically, the prohibited activity must not exceed the activity the employee performed for the former employer. Thus, agreements that fail to specify the restricted activity and essentially prohibit an employee from working for an employer "in any capacity" are unenforceable.[93]

At common law, in-term covenants not to compete, which apply while the employee is working for the employer, are also subject to strict scrutiny and the same rules regarding reasonableness of time, scope, and territorial limitation.[94]

1-5:6.1c Statutory Requirements

The statute does not restrict categories of employees who may be subject to non-compete provisions during the term of the employment relationship, provided that "such restrictions are reasonable in time, geographic area, and scope of prohibited activities."[95]

Under the statute, only certain categories of employees may be subject to post-termination—as opposed to in-term—non-compete agreements. These include employees who:

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

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

(3) Perform the following duties:

(A) Have a primary duty of managing the enterprise in which the employee is employed

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Wizard Int'l Corp. v. Brown, 272 Ga. App. 553, 556-57, 612 S.E.2d 873, 876 (2005) (holding restriction exceeding the counties where employee actually worked to be unreasonable); *Ceramic & Metal Coatings Corp. v. Hizer*, 242 Ga. App. 391, 393-94, 529 S.E.2d 160, 163 (2000) (same); *but see Northeast Ga. Artificial Breeders Assoc. v. Brown*, 209 Ga. 547, 547, 74 S.E.2d 660, 661 (1953).

93. *National Teen-Ager Co. v. Scarborough*, 254 Ga. 467, 469, 330 S.E.2d 711, 713 (1985); *Howard Schultz & Assocs. v. Broniec*, 239 Ga. 181, 185-86, 236 S.E.2d 265, 268 (1977); *Stultz v. Safety & Compliance Mgmt., Inc.*, 285 Ga. App. 799, 802-04, 648 S.E.2d 129, 132-33 (2007) (citing several cases on this point).

94. *Atlanta Bread Co. Int'l v. Lupton-Smith*, 285 Ga. 587, 591, 679 S.E.2d 722, 725 (2009).

95. O.C.G.A. § 13-8-53(a).

or of a customarily recognized department or subdivision thereof;

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

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

(4) Perform the duties of a key employee or of a professional.[96]

"Key employee" means:

> an employee who, by reason of the employer's investment of time, training, money, trust, exposure to the public, or exposure to customers, vendors, or other business relationships during the course of the employee's employment with the employer, has gained a high level of notoriety, fame, reputation, or public persona as the employer's representative or spokesperson or has gained a high level of influence or credibility with the employer's customers, vendors, or other business relationships or is intimately involved in the planning for or direction of the business of the employer or a defined unit of the business of the employer. Such term also means an employee in possession of selective or specialized skills, learning, or abilities or customer contacts or customer information who has obtained such skills, learning, abilities, contacts, or information by reason of having worked for the employer.[97]

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[96] O.C.G.A. § 13-8-53(a)(1)-(4); *see also CSM Bakery Sols., LLC v. Debus*, No. 1:16-CV-03732-TCB, 2017 WL 2903354, 2017 U.S. Dist. LEXIS 193775, at *5-6 (N.D. Ga. Jan. 25, 2017) (applying these factors in analyzing employee's job duties and responsibilities).

[97] O.C.G.A. § 13-8-51(8). Note that the definition of "key employee" incorporates part of the definition of "employee" under O.C.G.A. § 13-8-51(5)—a person "in possession of selective or specialized skills, learning, or abilities or customer contacts, customer

"Professional" means:

> an employee who has as a primary duty the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. Such term shall not include employees performing technician work using knowledge acquired through on-the-job and classroom training, rather than by acquiring the knowledge through prolonged academic study, such as might be performed, without limitation, by a mechanic, a manual laborer, or a ministerial employee.[98]

1-5:6.1d Reasonableness of Restrictions Under Statute

The statutory scheme substantially relaxes some of the more rigid common law rules. As a general matter, the code provides that "[w]henever a description of activities, products, or services, or geographic areas, is required by this Code section, any description that provides fair notice of the maximum reasonable scope of the restraint shall satisfy such requirement, even if the description is generalized or could possibly be stated more narrowly to exclude extraneous matters."[99]

With respect to geographic scope:

> any good faith estimate of the activities, products, or services, or geographic areas, that may be applicable at the time of termination shall also satisfy such requirement, even if such estimate is capable of including or ultimately proves to include extraneous activities, products, or services, or geographic areas. The post-employment covenant

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information, or confidential information who or that has obtained such skills, learning, abilities, contacts, or information by reason of having worked for an employer." Taken literally, this could lead to the seemingly unintended result that any employee who meets this part of the definition is also a "key employee."

98. O.C.G.A. § 13-8-51(14).

99. O.C.G.A. § 13-8-53(c)(1).

> shall 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.[100]

The code further provides:

> 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:
>
> (A) The total distance encompassed by the provisions of the covenant also is reasonable;
>
> (B) 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; or
>
> (C) Both subparagraphs (A) and (B) of this paragraph.[101]

With respect to the scope of prohibited activities, "[a]ctivities products, or services that are competitive with the activities, products, or services of an employer shall include activities, products, or services that are the same as or similar to the activities, products, or services of the employer."[102] Additionally, "[a]ctivities, 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."[103]

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100. O.C.G.A. § 13-8-53(c)(2).
101. O.C.G.A. § 13-8-56(2)(A)-(C).
102. O.C.G.A. § 13-8-53(c)(1).
103. O.C.G.A. § 13-8-53(c)(2).

On the issue of temporal scope in the employment context, the code provides a rebuttable presumption of reasonableness: "[A] court shall presume to be reasonable in time any restraint two years or less in duration and shall presume to be unreasonable in time any restraint more than two years in duration, measured from the date of the termination of the business relationship."[104]

With respect to in-term non-compete provisions, the statute provides that:

> [a]ny restriction that operates during the term of an employment relationship, agency relationship, independent contractor relationship, partnership, franchise, distributorship, license, ownership of a stake in a business entity, or other ongoing business relationship shall 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 relationship or deters any potential conflict of interest.[105]

Further, "[d]uring the term of the relationship, a time period equal to or measured by the duration of the parties' business or commercial relationship is reasonable."[106]

1-5:6.2 Non-Solicitation Covenants

Non-solicitation covenants generally seek to prevent a former employee from soliciting customers—or in some cases employees—of the former employer.

1-5:6.2a Common Law Requirements

At common law, an express geographic territory is not required for non-solicitation covenants if the prohibited customer group is defined with specificity.[107] Similarly, the non-solicitation covenant

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104. O.C.G.A. § 13-8-57(b)(5).

105. O.C.G.A. § 13-8-56(4).

106. O.C.G.A. § 13-8-56(1).

107. *W.R. Grace & Co., Dearborn Div. v. Mouyal*, 262 Ga. 464, 466-67, 422 S.E.2d 529, 532-33 (1992) ("Requiring an express geographic territorial description in all cases is not in keeping with the reality of the modern business world in which an employee's 'territory' knows no geographic bounds, as the technology of today permits an employee to service

need not contain an express temporal restriction on how long ago the employee served the customer.[108]

A non-solicitation covenant may not, however, prohibit the former employee from merely accepting unsolicited business from the former employer's customers.[109] Similarly, the employer does not have a protectable interest in preventing solicitation of its former customers.[110]

Employee non-solicitation clauses (sometimes referred to as non-recruitment provisions) do not have to be limited to employees with whom the former employee had an established relationship.[111] Additionally, a specific geographic limitation is not required.[112]

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clients located throughout the country and the world. Where the parameters of the restrictive covenant are as narrow as those set forth in the certified question, i.e., where the former employee is prohibited from post-employment solicitation of employer customers which the employee contacted during his tenure with the employer, there is no need for a territorial restriction expressed in geographic terms.") (footnote omitted); *see also Palmer & Cay of Ga., Inc. v. Lockton Cos., Inc.*, 280 Ga. 479, 480-81, 629 S.E.2d 800, 802-03 (2006) (lack of an express territorial limitation in a non-solicitation covenant, which was limited to prohibiting the former employees from soliciting customers the former employees served while working for former employer, did not render the covenant unenforceable).

108. *Palmer & Cay of Ga., Inc. v. Lockton Cos., Inc.*, 280 Ga. 479, 481-82, 629 S.E.2d 800, 803 (2006) ("[W]hen dealing with a covenant that prohibits the solicitation of customers whom the employee served, the entire length of service of the employee establishes the permissible temporal boundary.").

109. *Paragon Techs., Inc. v. InfoSmart Techs., Inc.*, 312 Ga. App. 465, 467, 718 S.E.2d 357, 359 (2011) ("The covenant here precluded InfoSmart from accepting unsolicited work from Paragon's former client. It is therefore unreasonable and cannot be enforced."); *Waldeck v. Curtis 1000, Inc.*, 261 Ga. App. 590, 592, 583 S.E.2d 266, 268 (2003) ("The nonsolicitation covenant in this case prohibits not only solicitation of Waldeck's former clients, but also the acceptance of business from unsolicited former clients, regardless of who initiated the contact. This is an unreasonable restraint because, in addition to overprotecting Curtis 1000's interests, it unreasonably impacts on Waldeck and on the public's ability to choose the business it prefers."); *Pregler v. C&Z, Inc.*, 259 Ga. App. 149, 150-51, 575 S.E.2d 915, 916 (2003) ("The nonsolicitation clause contained in the agreement is unenforceable because it prevents Pregler from accepting business from unsolicited former clients.").

110. *Wachovia Ins. Servs., Inc. v. Fallon*, 299 Ga. App. 440, 443-44, 682 S.E.2d 657, 661 (2009) (refusing to enforce non-solicitation provision because it could be read to preclude former employee from soliciting clients who had already severed their relationship with former employer); *Gill v. Poe & Brown of Ga.*, 241 Ga. App. 580, 583, 524 S.E.2d 328, 331 (1999) (employer had no legitimate business interest in preventing solicitation of clients who may have severed relationship with employer up to four years before employee's termination).

111. *CMGRP, Inc. v. Gallant*, 343 Ga. App. 91, 97, 806 S.E.2d 16, 21 (2017) ("We have repeatedly upheld employee non-recruitment provisions that were not limited to employees with whom the former employee had an established relationship.").

112. *CMGRP, Inc. v. Gallant*, 343 Ga. App. 91, 96, 806 S.E.2d 16, 21 (2017) (citing a number of cases and noting "this Court has upheld employee non-recruitment provisions that lacked a geographic limitation").

1-5:6.2b Statutory Requirements

Unlike its restriction on non-compete covenants, the statutory scheme does not restrict non-solicitation covenants to any particular class of employees.[113] The code further provides:

> [A]n employee may agree in writing for the benefit of an employer to refrain, for a stated period of time following termination, from soliciting, or attempting to solicit, directly or by assisting others, any business from any of such employer's customers, including actively seeking prospective customers, with whom the employee had material contact during his or her employment for purposes of providing products or services that are competitive with those provided by the employer's business. No express reference to geographic area or the types of products or services considered to be competitive shall be required in order for the restraint to be enforceable. Any reference to a prohibition against "soliciting or attempting to solicit business from customers" or similar language shall be adequate for such purpose and narrowly construed to apply only to: (1) such of the employer's customers, including actively sought prospective customers, with whom the employee had material contact; and (2) products or services that are competitive with those provided by the employer's business.[114]

The statute defines "material contact" as:

> [C]ontact between an employee and each customer or potential customer:
>
> (A) With whom or which the employee dealt on behalf of the employer;
>
> (B) Whose dealings with the employer were coordinated or supervised by the employee;

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113. O.C.G.A. § 13-8-53.
114. O.C.G.A. § 13-8-53(b).

(C) About whom the employee obtained confidential information in the ordinary course of business as a result of such employee's association with the employer; or

(D) Who receives products or services authorized by the employer, the sale or provision of, which results or resulted in compensation, commissions, or earnings for the employee within two years prior to the date of the employee's termination.[115]

Further, "[a]ctivities products, or services that are competitive with the activities, products, or services of an employer shall include activities, products, or services that are the same as or similar to the activities, products, or services of the employer."[116] Additionally, "[a]ctivities, 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."[117]

The same rebuttable presumption of reasonableness with respect to temporal scope applies to non-solicitation covenants as well.[118]

Note that the statute does not mention employee non-solicitation covenants that would appear to remain subject to a common law analysis.

1-5:6.3 Non-Disclosure Covenants

Non-disclosure covenants generally seek to prevent the former employee from disclosing or otherwise making use of the former employer's trade secrets or confidential information.[119]

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115. O.C.G.A. § 13-8-51(10)(A)-(D).

116. O.C.G.A. § 13-8-53(c)(1).

117. O.C.G.A. § 13-8-53(c)(2).

118. O.C.G.A. § 13-8-57(a).

119. Note that employees have an independent duty not to misappropriate trade secrets as discussed in Chapter 6 below.

1-5:6.3a Common Law Requirements

At common law, a non-disclosure restriction without a time limit is void.[120]

1-5:6.3b Statutory Requirements

The statutory scheme eliminates the time limit requirement for non-disclosure restrictions.[121] Further, the statute does not limit the type of employees who may be subject to such a restriction.[122]

The code defines "confidential information" as data and information:

> (A) Relating to the business of the employer, regardless of whether the data or information constitutes a trade secret as that term is defined in Code Section 10-1-761;
>
> (B) Disclosed to the employee or of which the employee became aware of as a consequence of the employee's relationship with the employer;
>
> (C) Having value to the employer;
>
> (D) Not generally known to competitors of the employer; and
>
> (E) Which includes trade secrets, methods of operation, names of customers, price lists, financial information and projections, route books, personnel data, and similar information;

provided, however, that such term shall not mean data or information (A) which has been voluntarily disclosed to the public by the employer, except where such public disclosure has been made by the employee without authorization from the employer; (B) which has been independently developed and disclosed by

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120. *Howard Schultz & Assocs. v. Broniec*, 239 Ga. 181, 188, 236 S.E.2d 265, 269 (1977); *Thomas v. Best Mfg. Corp.*, 234 Ga. 787, 788, 218 S.E.2d 68, 70 (1975); *U3S Corp. of Am. v. Parker*, 202 Ga. App. 374, 383-84, 414 S.E.2d 513, 520-21 (1991).

121. O.C.G.A. § 13-8-53(e) ("Nothing in this article shall be construed to limit the period of time for which a party may agree to maintain information as confidential or as a trade secret, or to limit the geographic area within which such information must be kept confidential or as a trade secret, for so long as the information or material remains confidential or a trade secret, as applicable.").

122. O.C.G.A. § 13-8-53(a)(1)-(4).

others; or (C) which has otherwise entered the public domain through lawful means.[123]

1-5:6.4 Miscellaneous Statutory Provisions

The statute provides that a court shall construe a restrictive covenant "to comport with the reasonable intent and expectations of the parties to the covenant and in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement."[124]

With respect to pleading and burden of proof, the statute provides that:

> The person seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant. If a person seeking enforcement of the restrictive covenant establishes by prima-facie evidence that the restraint is in compliance with the provisions of Code Section 13-8-53, 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.[125]

"Legitimate business interest" includes, but is not limited to:

(A) Trade secrets, as defined by Code Section 10-1-761;

(B) Valuable confidential information that otherwise does not qualify as a trade secret;

(C) Substantial relationships with specific prospective or existing customers, patients, vendors, or clients;

(D) Customer, patient, or client good will associated with:

(i) An ongoing business, commercial, or professional practice, including, but not

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123. O.C.G.A. § 13-8-51(3)(A)-(E).
124. O.C.G.A. § 13-8-54(a).
125. O.C.G.A. § 13-8-55.

limited to, by way of trade name, trademark, service mark, or trade dress;

(ii) A specific geographic location; or

(iii) A specific marketing or trade area; and

(E) Extraordinary or specialized training.[126]

Additionally, the code provides that in the employment context, the court "may consider the economic hardship imposed upon an employee by enforcement of the covenant."[127] This provision appears to suggest that in certain cases, an otherwise enforceable covenant might not be enforced or enforced in full, if the employee can make some showing of "economic hardship." What test would be applied and what level of "hardship" would be required is currently unclear.

1-5:6.5 Remedies for Breach

Restrictive covenant cases are typically time sensitive (based on the concern that the breaching party is causing harm on an immediate and ongoing basis) and this is reflected in the relief sought. Typically, the plaintiff will seek temporary and permanent injunctive relief to prevent ongoing harm either, depending on the plaintiff's position, to prevent the breaching employee from continuing the breach or to prevent the former employer from interfering with the current employment.[128] A party may also seek damages for breach of contract.[129]

1-5:6.6 Statute of Limitations

Because of the time-sensitive nature of restrictive covenant cases, statute of limitations issues do not arise with any frequency. The statute of limitations for breach of "simple contracts in writing" is six years.[130]

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126. O.C.G.A. § 13-8-51(9)(A)-(E).

127. O.C.G.A. § 13-8-58(d).

128. *See generally* O.C.G.A. §§ 9-5-1 *et seq.*, discussing injunctive relief.

129. *See* O.C.G.A. § 13-6-2 ("Damages recoverable for a breach of contract are such as arise naturally and according to the usual course of things from such breach and such as the parties contemplated, when the contract was made, as the probable result of its breach.").

130. O.C.G.A. § 13-8-55.

1-6 IMMIGRATION AND CITIZENSHIP ISSUES

Under federal law, employers may employ only individuals who may legally work in the United States. Georgia requires all private employers with 10 or more employees to enroll in and use the federal E-Verify system, which allows employers to check new hires against government databases.[131]

1-6:1 Duty to Report New Hires and Rehires

Employers are required to report to the state support registry (managed by the Georgia Department of Human Services) the hiring of any person who resides or works in the state to whom the employer anticipates paying earnings and the hiring or return to work of any employee who was laid off, furloughed, separated, granted leave without pay, or terminated from employment.[132] The report must be submitted within 10 days of the employee's hiring, rehiring, or return to work.[133] Employers who fail to make the required reports shall be given a written warning.[134]

The Georgia Department of Labor requires employers to complete the Form DOL-800, "Separation Notice," for each worker separated regardless of the reason for separation (except when mass separation Form DOL-402 and Form DOL-402A notices are to be filed).[135]

1-7 MASS LAYOFFS AND CLOSINGS—NOTICE REQUIREMENTS

1-7:1 WARN Act

The federal Worker Adjustment and Retraining Notification Act ("WARN")[136] requires that covered employers must give affected employees and government entities 60 days' notice of covered

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131. O.C.G.A. § 36-60-6.

132. O.C.G.A. § 19-11-9.2.

133. O.C.G.A. § 19-11-9.2(c).

134. O.C.G.A. § 19-11-9.2(c)(2).

135. Ga. Dep't of Labor Reg. 300-2-7-.06, *available at* https://dol.georgia.gov/sites/dol.georgia.gov/files/related_files/document/300_2_7.pdf (last visited January 30, 2020). Georgia Department of Labor Form DOL-800 is available in Appendix 3-001 below. Georgia Department of Labor Forms DOL-402, DOL 402a, and DOL 402i (the instructions) are available in Appendix 1-002, 1-003 and 1-001 below.

136. Pub. L. No. 100-379, 102 Stat. 890 (Aug. 4, 1988); 29 U.S.C. § 2101 note.

plant closings and covered mass layoffs.[137] The purpose of the WARN Act is to provide protection to workers, their families and communities so that workers may have transition time to adjust to the loss of employment, seek and obtain alternative jobs and, if necessary, begin skill training or retraining to allow the workers to successfully compete in the job market.[138]

1-7:1.1 Form and Delivery of Notice

Notice under the WARN Act must be specific.[139] Where the employer has provided voluntary notice more than 60 days in advance, but the notice does not contain all of the required elements, the employer must ensure that all of required information required is provided in writing at least 60 days in advance of a covered employment action.[140]

The applicable regulations describe in detail the form of notice that must be given. Notice to representatives[141] of an affected party must include: (1) the name and address of the employment site where the plant closing or mass layoff is to occur and the name and telephone number of a company official to contact for further information; (2) a statement concerning whether the planned action is expected to be permanent or temporary and a further statement notifying if the entire plant is to be closed; (3) the expected date of the first action and a projected schedule for when separations will take place; and (4) job titles for the affected positions and an anticipated separation schedule.[142] The employer may also include in the notice additional information that may be useful to the

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137. 29 U.S.C. §§ 2101 *et seq*. Specifically, "[a]n employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order." 29 U.S.C. § 2102(a); *see also Sides v. Macon Cnty. Greyhound Park, Inc.*, 725 F.3d 1276, 1281 (11th Cir. 2013) (noting that a valid WARN Act claim requires: "(1) a mass layoff [or plant closing as defined by the statute] conducted by (2) an employer who fired employees (3) who, pursuant to WARN, are entitled notice") (citing *Allen v. Sybase, Inc.*, 468 F.3d 642, 654 (10th Cir. 2006)).

138. 20 C.F.R. § 639.1(a). *Snider v. Commercial Fin. Servs., Inc.*, 288 B.R. 890, 895 (N.D. Okla. 2002) ("[T]he WARN Act prevents an employer from implementing a mass layoff solely with its own economic interest in mind.").

139. 20 C.F.R. § 639.7(a).

140. 20 C.F.R. § 639.7(a).

141. The term "representative means "an exclusive representative of employees within the meaning of section 9(a) or 8(f) of the National Labor Relations Act or section 2 of the Railway Labor Act." 20 C.F.R. § 639.3.

142. 20 C.F.R. § 639.7(c).

employees, such as available assistance or job searching resources for the employees and, if the action is expected to be temporary, the expected duration.[143]

For employees who do not have a representative, the notice must be written in language that is understandable to the employees and must contain: (1) a statement concerning whether the planned action is expected to be permanent or temporary, and if the entire plant is to be closed, a statement to that effect; (2) the anticipated dates for when the plant closing or mass layoff will begin and when the individual employee will be separated; (3) whether bumping rights exist; and (4) the name and telephone number of a company official the employee may contact for further information.[144] The employer may also include in the notice additional information that may be useful to the employees, such as available assistance or job searching resources for the employees and, if the action is expected to be temporary, the expected duration.[145]

The notices to be separately provided to the state dislocated worker unit and to the chief elected official of the unit of local government are to contain: (1) the name and address of the employment site where the plant closing or mass layoff is to occur and the name and telephone number of a company official who may be contacted for further information; (2) a statement concerning whether the planned action is expected to be permanent or temporary, and if the entire plant is to be closed, a statement to that effect; (3) the expected date of the first separation, and the anticipated separation schedule; (4) job titles of the positions to be affected and the number of affected employees in each job classification; (5) whether or not bumping rights exist; and (6) identification of each union representing affected employees and the name and address of the chief elected officer of each union.[146] The notice may also include additional information that may be useful to employees such as a statement of whether the planned action is expected to be temporary and, if so, the expected duration.[147]

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143. 20 C.F.R. § 639.7(c).
144. 20 C.F.R. § 639.7(d).
145. 20 C.F.R. § 639.7(d).
146. 20 C.F.R. § 639.7(e).
147. 20 C.F.R. § 639.7(e).

In lieu of the content of the notices to the state dislocated worker unit and to the chief elected official of the unit of local government described above, the employer may furnish an abbreviated notice with the additional information to be maintained on site and readily accessible for inspection.[148]

Despite these express categories on information for each notice, the regulations also state that errors in the information provided that occur because events later change or that are minor, inadvertent errors are not intended to be a basis for finding a violation.[149]

A notice may be conditional in nature and contingent upon the occurrence or nonoccurrence of an event but only when the event is definite and its occurrence or nonoccurrence will necessarily lead to the plant closing or mass layoff less than 60 days after the event.[150]

Any reasonable method of delivery that is designed to ensure receipt of the notice at least 60 days before separation is acceptable (for example, first class mail or personal delivery with an optional signed receipt).[151] The applicable regulations state that in the case of notification directly to affected employees, insertion of the notice into pay envelopes is a viable option but that "ticketed notice" (preprinted notice regularly included in each employee's pay check or pay envelope) does not meet the requirements of the Act.[152]

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148. 20 C.F.R. § 639.7(f).

149. 20 C.F.R. § 639.7(a)(4); *Schmelzer v. Office of Compliance*, 155 F.3d 1364, 1369 (Fed. Cir. 1998) ("Courts that have addressed technically deficient WARN Act notices have rejected the 'strict compliance' test . . . Instead, they have looked to the purposes underlying the WARN Act and determined whether those purposes were satisfied under the circumstances by the notice that was given to the employees."); *Sides v. Macon Cnty. Greyhound Park, Inc.*, 725 F.3d 1276, 1285 (11th Cir. 2013) ("It is inconceivable that [the employer's] supposed 'notice' in the form of billboard ads, third-party newspaper articles, internet postings and memoranda blaming the Governor for raids, satisfies the type of 'brief statement of the basis for reducing the notification period' that Congress envisioned in drafting the WARN Act."); *Nagel v. Sykes Enters., Inc.*, 383 F. Supp. 2d 1180, 1198-99 (D.N.D. 2005) (holding that WARN Act notice that failed to address bumping rights did not prejudice displaced employee where there was no evidence that the employee would have any ability to exercise rights under the alleged equivalent "gatekeeper" system and that "to allow an action for the inadvertent omission of minor information as in the present case would go against the intent of the statute and the case law interpreting it").

150. 20 C.F.R. § 639.7(a).

151. 20 C.F.R. § 639.8.

152. 20 C.F.R. § 639.8.

1-7:1.2 Covered Employers

A covered employer is any "business enterprise" that employs either 100 or more employees (excluding part-time employees) or 100 or more employees including part-time employees, who in the aggregate work at least 4,000 hours per week, not including overtime.[153] "Employer" includes nonprofit organizations that meet the size requirements but generally excludes governmental entities.[154] Generally, individuals are not liable under WARN.[155]

Whether independent contractors or subsidiaries that are wholly or partially owned by a parent company are treated as part of the parent company or as separate employers depends upon their level of independence from the parent entity.[156]

1-7:1.3 Employees

The term "employee" includes workers on temporary layoff or on leave who have a reasonable expectation of recall.[157] An employee has a "reasonable expectation of recall" when the employee understands, either through notification or through industry practice, that his or her employment with the employer has been temporarily interrupted and that he or she will be recalled to the same or to a similar job.[158]

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153. 29 U.S.C. § 2101(a)(1).

154. 20 C.F.R. § 639.3(a). Note, however, that "employer" includes public and quasi-public entities which engage in business and are separately organized from the regular government, with their own governing bodies and which have independent authority over personnel and assets. 20 C.F.R. § 639.3(a); *see, e.g., Castro v. Chi. Hous. Auth.*, 360 F.3d 721, 729-30 (7th Cir. 2004) (holding that the Chicago Housing Authority was an "employer" where it engaged in business renting, leasing, purchasing, and selling real estate, independently managed public assets, and was separate from the City of Chicago).

155. *Cruz v. Robert Abbey, Inc.*, 778 F. Supp. 605, 609 (E.D.N.Y. 1991) (determining that Congress intended a "business enterprise" to mean a corporate entity such as a corporation, limited partnership, or partnership and not an individual); *Lewis v. Textron Auto. Co.*, 935 F. Supp. 68, 71 (D.N.H. 1996) (same).

156. Some of the factors considered in this determination include (i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations. 20 C.F.R. § 639.3(a); *see also Pearson v. Component Tech. Corp.*, 247 F.3d 471, 495 (3d Cir. 2001) ("Affiliated corporate liability under the WARN Act is ultimately an inquiry into whether the two nominally separate entities operated at arm's length.").

157. 20 C.F.R. § 639.3(a)(1)(ii).

158. 20 C.F.R. § 639.3(a)(1)(ii); *Hartel v. Unity Recovery Ctr., Inc.*, No. 16-80471-CIV, 2017 WL 1291952, at *5 (S.D. Fla. Jan. 26, 2017) ("Whether a worker on temporary layoff or leave has a 'reasonable expectation of recall' is an objective inquiry, as the question is not whether the employees . . . believed they had a fairly good chance of being recalled, but rather, whether a reasonable employee, in the same or similar circumstances . . . would be

The notice must be provided to each "affected employee."[159] An "affected employee" is an employee "who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by [his or her] employer." [160]

An "employment loss" means "(A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period."[161] Where a termination or a layoff is involved, there is no "employment loss" if an employee is reassigned or transferred to employer-sponsored programs, such as retraining or job search activities, provided the reassignment does not constitute a constructive discharge or other involuntary termination.[162]

There is also no "employment loss" if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, before the closing or layoff the employer either offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a six-month break in employment, or the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a six-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.[163] For purposes of this provision, "relocation or consolidation" of part or all of the employer's business, means "that some definable business, whether

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expected to be recalled.") (quoting in part *Bledsoe v. Emery Worldwide Airlines, Inc.*, 635 F.3d 836, 848 (6th Cir. 2011) (internal quotations omitted); *Teamsters Local 838 v. Laidlaw Transit, Inc.*, 156 F.3d 854, 856 (8th Cir. 1998) (holding in part that seasonal school bus drivers on temporary layoff during the summer had a reasonable expectation of recall); *Damron v. Rob Fork Min. Corp.*, 739 F. Supp. 341, 345 (E.D. Ky. 1990), *aff'd*, 945 F.2d 121 (6th Cir. 1991) (holding in part that workers did not have a reasonable expectation of recall where "[a]lthough the cycle of layoff to employment in the coal industry may be slower than a period of weeks or months, the eight to ten year period in this instance and the slowness of any growth taking place at Mine 29 had all appearances of permanence"); *Martin v. AMR Servs. Corp.*, 877 F. Supp. 108, 114 (E.D.N.Y.), *aff'd sub nom. Gonzalez v. AMR Servs. Corp.*, 68 F.3d 1529 (2d Cir. 1995) (noting that "[t]he provision appears designed to prevent employers from circumventing WARN requirements in bad faith by 'laying off' employees before 'terminating' them").

159. 29 U.S.C. § 2102(a)(1).

160. 29 U.S.C. § 2101(a)(5).

161. 29 U.S.C. § 2101(a)(6).

162. 20 C.F.R. § 639.3.

163. 29 U.S.C. § 2101(b)(2); 20 C.F.R. § 639.3.

customer orders, product lines, or operations, is transferred to a different site of employment and that transfer results in a plant closing or mass layoff."[164]

1-7:1.4 Mass Layoffs and Plant Closings

A "plant closing" is the permanent or temporary shutdown of a "single site of employment", or one or more "facilities or operating units" within a single site of employment, if the shutdown results in an "employment loss" during any 30-day period at the single site of employment for 50 or more full-time employees.[165] A single site of employment may include either a single location or a group of contiguous locations.[166] The applicable regulations contain a detailed description, with examples, of what constitutes a "single site of employment."[167]

A "shutdown" occurs when there is an effective cessation of production or work performed by a unit, even if a few employees remain.[168] A "temporary shutdown" will trigger the notice requirement only if there are a sufficient number of terminations, layoffs exceeding 6 months, or reductions in the hours of work to meet the definition of "employment loss."[169]

A "mass layoff" is a reduction in force that is not the result of a plant closing and results in an employment loss at a single site of employment during any 30-day period for at least 33 percent of

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164. 20 C.F.R. § 639.3.

165. 29 U.S.C. § 2101(a)(2); 20 C.F.R. § 639.3(b).

166. 20 C.F.R. § 639.3(b); *see also, e.g., Davis v. Signal Int'l Texas GP, L.L.C.*, 728 F.3d 482, 487 (5th Cir. 2013) (noting that "what matters in determining whether separate facilities constitute a single site of employment is not the immediate purpose of this or that facility, but rather what ultimate operational purpose is served by the facilities"); *Rifkin v. McDonnell Douglas Corp.*, 78 F.3d 1277, 1280 (8th Cir. 1996) ("As a general rule, geographically related facilities are single sites of employment whereas geographically separate facilities are separate sites.").

167. 20 C.F.R. § 639.3(i).

168. 20 C.F.R. § 639.3(b); *Reyes v. Greater Tex. Finishing Corp.*, 19 F. Supp. 2d 709, 714 (W.D. Tex. 1998) (holding that no plant closing occurred where both before and after the layoffs and terminations the employer continued its regular operations and did not permanently or temporarily shut down its operations); *Marques v. Telles Ranch, Inc.*, 867 F. Supp. 1438, 1442 (N.D. Cal. 1994), *aff'd*, 131 F.3d 1331 (9th Cir. 1997), *and aff'd in part by* 133 F.3d 927 (9th Cir. 1997) (holding that a "shutdown" occurred when the employer notified its employees that it was terminating its lettuce harvesting operations and for the next season hired a farm labor contracting company to do its lettuce harvesting).

169. 20 C.F.R. § 639.3(b).

active, full-time employees and at least 50 full-time employees.[170] If 500 or more full-time employees are affected, the 33 percent requirement does not apply and notice will be required as long as the other criteria are met.[171]

1-7:1.5 Exemptions

The WARN Act does not apply to a plant closing or mass layoff if (1) the closing is of a temporary facility or the closing or layoff results from the completion of a particular project or undertaking and the affected employees were hired upon their understanding that employment would be limited to the duration of the facility or project; or (2) the closing or layoff constitutes a strike or a lockout that is not intended to evade the requirements of Act.[172]

For the first exemption to apply, the employees must clearly understand at the time of hire that the employment is temporary in nature.[173] Whether the employees had this understanding may be determined by referencing employment contracts, collective bargaining agreements, or the employment practices of the particular industry or locality.[174] Whether a job related to particular contract or order is temporary depends upon whether the contract or order is part of a long-term relationship.[175] The burden is on the employer to show clear communication of the temporary nature of the project or facility.[176]

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170. 29 U.S.C. § 2010(a)(3); *see Sides v. Macon Cnty. Greyhound Park, Inc.*, 725 F.3d 1276, 1283 (11th Cir. 2013) (holding that district court erred in aggregated an earlier plant closing with an unrelated layoff to create a "mass layoff" since a mass layoff by definition does not include a plant closing).

171. 29 U.S.C. § 2101(b)(3); 20 C.F.R. § 639.3(c).

172. 29 U.S.C. § 2103.

173. 20 C.F.R. § 639.5(c); *Marques v. Telles Ranch, Inc.*, 867 F. Supp. 1438, 1444 (N.D. Cal. 1994), *aff'd*, 131 F.3d 1331 (9th Cir. 1997), *and aff'd in part by* 133 F.3d 927 (9th Cir. 1997) (holding in part that seasonal employees did not understand at time of hiring that their employment was temporary because the employer treated them as if they were permanent seasonal employees by not requiring them to fill out a new Form I-9 each season, by giving them seniority status, by providing them handbooks stating that vacation benefits increased after the third year of work, and by giving them layoff slips that contained information about the next season).

174. 20 C.F.R. § 639.5(c).

175. 20 C.F.R. § 639.5(c) ("For example, an aircraft manufacturer hires workers to produce a standard airplane for the U.S. fleet under a contract with the U.S. Air Force with the expectation that its contract will continue to be renewed during the foreseeable future. The employees of this manufacturer would not be considered temporary.").

176. 20 C.F.R. § 639.5(c).

A lockout occurs when for "tactical or defensive reasons" during collective bargaining or a labor dispute, the employer "lawfully refuses to utilize some or all of its employees for the performance of available work."[177] The WARN Act does not define the term "strike" although the Labor Management Relations Act defines it generally to include "any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees."[178]

A plant closing or mass layoff at a site where a strike or lockout is taking place must be related to the strike or lockout to be covered by this exemption.[179] Additionally, non-striking employees at the same site who experience employment loss as a result of a strike are entitled to notice unless some other exception applies.[180]

1-7:1.6 Exceptions to 60-Day Notice Requirement

The WARN Act contains three exceptions to the 60-day notice requirement. The employer bears the burden of proof that one of the exceptions has been met.[181]

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177. 20 C.F.R. § 639.5(d). *See also Local 2-1971 of Pace Int'l Union v. Cooper*, 364 F. Supp. 2d 546, 559 (W.D.N.C. 2005) (finding genuine issue of fact existed as to whether closing of a plant was a lockout or a mass layoff or plant closing based on lack of available work); *New England Health Care Emps., Dist. 1199, S.E.I.U. AFL-CIO v. Fall River Nursing Home, Inc.*, No. CV-96-12216-PBS, 1998 WL 518188, at *5 (D. Mass. July 30, 1998) (holding in part that a lockout did not occur when employer transferred all of its residents to other facilities, which effectively closed the nursing home facility, and left no "available work" to be done by union employees).

178. 29 U.S.C. § 142(2); *New England Health Care Emps., Dist. 1199, S.E.I.U. AFL-CIO v. Fall River Nursing Home, Inc.*, No. CV-96-12216-PBS, 1998 WL 518188, at *5 (D. Mass. July 30, 1998) (holding in part that because health care facilities must execute patient care contingency plans in advance of an actual strike, a shutdown of a health care facility reasonably resulting from a strike notice "constitutes a strike" unless the strike notice was rescinded in a timely way).

179. 20 C.F.R. § 639.5(d); *see also Teamsters Nat'l Freight Indus. Negotiating Comm. on Behalf of Howe v. Churchill Truck Lines, Inc.*, 935 F. Supp. 1021, 1026 (W.D. Mo. 1996), *aff'd sub nom. Teamsters Nat'l Freight Indus. Negotiating Comm. on Behalf of Teamster Local Unions with Churchill Truck Lines Contracts v. Churchill Truck Lines, Inc*., 121 F.3d 447 (8th Cir. 1997) ("In contrast to the 'business circumstance' exception, the 'strike exemption' appears to place a less onerous burden upon the employer who need only prove that the closing 'related' to the strike, to be exempted from the sixty-day notice requirement. Foreseeability and direct causation are not at issue. Thus, the protection otherwise afforded employees by the WARN Act is lifted and striking employees are shouldered with some of the responsibility for their decision to strike.").

180. 20 C.F.R. § 639.5(d).

181. 20 C.F.R. § 639.9.

Under the "unforeseeable business circumstances" exception, the employer may order a plant closing or mass layoff before the end of the 60-day period if "the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required."[182] To qualify for this exception, the employer must show (1) that the business circumstances that caused the layoff were not reasonably foreseeable and (2) that those circumstances were the cause of the layoff.[183]

An important factor in determining the foreseeability of the business circumstance is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control.[184] The test for reasonable foreseeability is focused on the employer's business judgment.[185] Although the employer is not required to accurately predict the general economic conditions that might affect the demand for its products or services, it must exercise the same commercially reasonable

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182. 29 U.S.C. § 2102(b)(2)(A).

183. 20 C.F.R. § 639.9(b); *Calloway v. Caraco Pharm. Labs., Ltd.*, 800 F.3d 244, 251 (6th Cir. 2015).

184. 20 C.F.R. § 639.9(b)(1) (providing examples including "[a] principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, . . . an unanticipated and dramatic major economic downturn . . . [and] a government ordered closing of an employment site that occurs without prior notice"); *see also Calloway v. Caraco Pharm. Labs., Ltd.*, 800 F.3d 244, 251 (6th Cir. 2015) (affirming district court's holding that a mass seizure of the employer's products by the FDA was not unforeseeable where the employer had received increasing criticism from the FDA as well as warning letters and its consultants advised that the company was at serious risk of an enforcement action); *Roquet v. Arthur Andersen LLP*, 398 F.3d 585, 589 (7th Cir. 2005) (holding that layoffs were unforeseeable before employer was indicted where, in the past, the government typically indicted culpable individuals, not companies as a whole, the employer continued to negotiate with the government until the very end, and layoffs began only after the indictment became public); *Pena v. Am. Meat Packing Corp*., 362 F.3d 418, 421-22 (7th Cir. 2004) (finding genuine issue of fact on unforeseeability precluding summary judgment where USDA had suspended inspection of a meat packing plant, ordered over 2 million pounds of meat destroyed, and insisted on costly repairs to the cooler at the facility); *Loehrer v. McDonnell Douglas Corp.*, 98 F.3d 1056, 1062 (8th Cir. 1996) (holding in the "rather unique, politically charged area of defense contracts" that termination of major contract was not reasonably foreseeable where, despite problems with the contract and project, the government had expressed a need for the program, Congress had expressed ongoing conditional support, and five days before the termination announcement, the undersecretary of the Navy had stated that the government had no intention of terminating the contract).

185. 20 C.F.R. § 639.9(b)(2).

business judgment that a similarly situated employer would in predicting the demands of its market.[186]

Under the "faltering company exception," an employer may shut down a single site of employment before the end of the 60-day period if, as of the time that the notice would have been required, the employer was actively seeking capital or business that, had it been obtained, would have enabled the employer to avoid or postpone the shutdown.[187] Additionally, the employer must have reasonably and in good faith believed that giving the required WARN Act notice would have precluded the employer from obtaining the needed capital or business.[188] The faltering company exception applies to plant closings but not to mass layoffs.[189]

To qualify for this exception, the employer must meet four requirements. First, the employer must have been actively seeking capital or business at the time that the 60-day notice would have been required.[190] Second, there must have been a realistic opportunity that the financing or business sought would be obtained.[191] Third, the financing or business sought must have been sufficient that if it had been obtained, it would have enabled the employer to keep the facility, unit or site open for a reasonable period of time.[192] Fourth, the employer must reasonably and in good faith have believed that

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186. 20 C.F.R. § 639.9(b)(2); *see also Watson v. Mich. Indus. Holdings, Inc.*, 311 F.3d 760, 765 (6th Cir. 2002) (noting that "a reviewing court must be careful to avoid analysis by hindsight and remember that an employer's commercially reasonable business judgment dictates the scope of this exception").

187. 29 U.S.C. § 2102(b)(1).

188. 29 U.S.C. § 2102(b)(1).

189. 20 C.F.R. § 639.9.

190. *See* 20 C.F.R. § 639.9 ("That is, the employer must have been seeking financing or refinancing through the arrangement of loans, the issuance of stocks, bonds, or other methods of internally generated financing; or the employer must have been seeking additional money, credit, or business through any other commercially reasonable method. The employer must be able to identify specific actions taken to obtain capital or business."); *see also In re APA Transp. Corp. Consol. Litig.*, 541 F.3d 233, 250 (3d Cir. 2008), *as amended* (Oct. 27, 2008) (holding that single meeting with lender that did not constitute a formal request for financing was insufficient to demonstrate that employer was "actively seeking" financing).

191. 20 C.F.R. § 639.9; *Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dep't Stores, Inc.*, 15 F.3d 1275, 1281 (5th Cir. 1994) (holding there was no causal connection between the search for capital and the ultimate reduction in workforce where evidence showed there was not a realistic opportunity of obtaining the necessary capital or business).

192. 20 C.F.R. § 639.9; *Law v. Am. Capital Strategies, Ltd.*, No. CIV. 3:05-0836, 2007 WL 221671, at *10 (M.D. Tenn. Jan. 26, 2007) (concluding that this exception is inapplicable where the closings and/or layoffs occur as a result of a failed sale of the business).

giving the required WARN Act notice would have prevented the employer form obtaining the needed capital or business.[193]

The third exception applies when the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or drought.[194] To qualify for this exception, the employer must be able to demonstrate that its plant closing or mass layoff is a direct result of a natural disaster.[195] Thus, when a plant closing or mass layoff occurs as an indirect result of a natural disaster, the exception does not apply although the "unforeseeable business circumstance" exception might be applicable.[196]

Even if an employer establishes that one of these exceptions prevented it from giving notice 60 days in advance, the WARN Act still requires that employers "give as much notice as is practicable" under the circumstances.[197] Where appropriate, notice after the fact may be required.[198] In addition to the other required items in the notice, the employer must also provide a brief statement of its reason for shortening the notice period.[199]

1-7:1.7 Remedies for Violations

An employer that violates the WARN Act notice requirements is liable to each aggrieved employee who suffers an employment loss as a result of the closing or layoff.[200] The measure of

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193. 20 C.F.R. § 639.9 ("The employer must be able to objectively demonstrate that it reasonably thought that a potential customer or source of financing would have been unwilling to provide the new business or capital if notice were given, that is, if the employees, customers, or the public were aware that the facility, operating unit, or site might have to close. This condition may be satisfied if the employer can show that the financing or business source would not choose to do business with a troubled company or with a company whose workforce would be looking for other jobs."); *Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dep't Stores, Inc*., 15 F.3d 1275, 1281 (5th Cir. 1994) (holding there was no causal connection between the search for capital and the ultimate reduction in workforce where evidence did not show the employer reasonably believed that giving notice would prevent the employer's actions from succeeding).

194. 29 U.S.C. § 2102(b).

195. 20 C.F.R. § 639.9.

196. 20 C.F.R. § 639.9.

197. 29 U.S.C. § 2102(b)(3); *Sides v. Macon Cnty. Greyhound Park, Inc.*, 725 F.3d 1276, 1284 (11th Cir. 2013) (holding that employer could not invoke unforeseeable business circumstances defense where it did not give any notice to affected employees).

198. 20 C.F.R. § 639.9.

199. 20 C.F.R. § 639.9.

200. 29 U.S.C. § 2104. An aggrieved employee is "an employee who has worked for the employer ordering the plant closing or mass layoff and who, as a result of the failure by the

damages includes back pay for each day of the violation at a rate representing the higher of either the employee's average regular rate of pay during the last three years of employment or the employee's final regular rate.[201] The WARN Act does not define "day" for purposes of the damages calculation. With the exception of the Third Circuit, every circuit to have considered this issue has held that "day" means a working day and not a calendar day.[202]

Additionally, aggrieved employees can recover benefits under an employee benefit plan, including the cost of medical expenses incurred during the employment loss that would have been covered under the benefit plan if the employment loss had not occurred.[203]

Damages are calculated for the period of the violation up to 60 days but in no event for more than one-half of the number of days the employee actually worked for the employer.[204] Additionally, any damages are reduced by any wages paid to the employee during the period of the violation, any voluntary and unconditional payment to the employee that is not required by any legal obligation; and any payment by the employer to a third party or trustee (such as premiums for health benefits or payments to a pension plan) on behalf of and attributable to the employee.[205] Additionally, the employer's liability with respect to a pension plan may be reduced by crediting the employee with service under the plan for the period of the violation.[206]

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employer to comply with section 2102 of this title, did not receive timely notice either directly or through his or her representative as required by section 2102 of this title." 29 U.S.C. § 2104.

201. 29 U.S.C. § 2104(a)(1)(A).

202. *Joe v. First Bank Sys., Inc*., 202 F.3d 1067, 1072 (8th Cir. 2000) (work days); *Burns v. Stone Forest Indus., Inc.*, 147 F.3d 1182, 1182-83 (9th Cir. 1998) (work days); *Saxion v. Titan-C-Manufacturing, Inc.*, 86 F.3d 553, 558-61 (6th Cir. 1996) (work days); *Frymire v. Ampex Corp*., 61 F.3d 757, 771-72 (10th Cir. 1995) (work days); *Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dep't Stores, Inc*., 15 F.3d 1275, 1282-86 (5th Cir. 1994) (work days); *United Steelworkers of Am. v. N. Star Steel Co*., 5 F.3d 39, 41-43 (3d Cir. 1993) (calendar days).

203. 29 U.S.C. § 2104(a)(1)(B); note that the employee can recover benefit costs regardless of whether the employee incurred medical expenses. *See Jones v. Kayser-Roth Hosiery, Inc.*, 748 F. Supp. 1292, 1295, *amended by* 753 F. Supp. 218 (E.D. Tenn. 1990) ("Any class member who incurred a covered medical expense is entitled to and *will* recover that expense, *in addition to* the value of the benefit itself.").

204. 29 U.S.C. § 2104.

205. 29 U.S.C. § 2104(a)(2).

206. 29 U.S.C. § 2104(a)(2).

An employer in violation of the notice obligation to the applicable unit of local government is subject to a civil penalty of not more than $500 for each day of the violation. This penalty will not apply, however, if the employer pays each aggrieved employee the amount for which the employer is liable to the employee within three weeks from the date the employer orders the shutdown or layoff.

The court may, in its discretion, also award to the prevailing party its reasonable attorney's fees.[207]

The remedies provided in this section of the WARN Act are the exclusive remedies for violations.[208]

1-7:1.8 Good Faith Defense

The WARN Act provides for a good faith defense if the employer had reasonable grounds for believing that its act or omission was not a violation of the Act.[209] The court, in its discretion, may reduce the amount of an employer's liability if the employer proves to the satisfaction of the court that the act or omission was in good faith and that the employer had reasonable grounds to believe it was not a violation. [210] Mere

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207. 29 U.S.C. § 2104(a)(6). For further discussion on the meaning of "prevailing party," *see generally Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992).

208. 29 U.S.C. § 2104(b). Note, however, that although the statute states that "[u]nder this chapter, a Federal court shall not have authority to enjoin a plant closing or mass layoff," 29 U.S.C. § 2104(b), courts have entered injunctive relief in other contexts. *See Local 217 Hotel & Rest. Emps. Union v. MHM, Inc.*, 805 F. Supp. 93, 110 n.21 (D. Conn. 1991), *aff'd*, 976 F.2d 805 (2d Cir. 1992) (holding that exclusivity provision does not deprive a federal court of its authority to issue a preliminary injunction under WARN); *Local 397, Int'l Union of Elec., Elec., Salaried, Mach. & Furniture Workers, AFL-CIO v. Midwest Fasteners, Inc.*, 763 F. Supp. 78, 81 (D.N.J. 1990) ("In WARN, Congress has expressly restricted the power of a federal court to enjoin a plant closing or a mass layoff. However, Congress has not specifically restricted the power of a federal court to issue a preliminary injunction to protect a future damages award.") (internal citation omitted).

209. 29 U.S.C. § 2104(4).

210. 29 U.S.C. § 2104(a)(4); *Day v. Celadon Trucking Servs., Inc*., 827 F.3d 817, 836 (8th Cir. 2016) ("Even if we assume that [the employer] had a subjective intent to comply with the WARN Act, [the employer] has not demonstrated that it had a reasonable basis for believing that it was not responsible for giving WARN Act notice."); *Castro v. Chi. Hous. Auth*., 360 F.3d 721, 731 (7th Cir. 2004) ("The good faith reduction is intended for circumstances where the employer technically violates the law but shows that it did everything possible to ensure that its employees received sufficient notice that they would be laid off."); *Kildea v. Electro-Wire Prod., Inc.*, 144 F.3d 400, 409 (6th Cir. 1998) (reversing district court's finding that employer acted unreasonably and remanding for consideration of good faith defense where employer consulted with counsel who both examined the notice provisions of the WARN Act and utilized material it had received

ignorance of the WARN Act is not enough to establish the good faith exception.[211]

1-7:1.9 Statute of Limitations

The WARN Act does not contain a statute of limitation. Accordingly, courts must apply the most analogous state statute of limitations.[212]

1-7:2 Georgia Requirements

Although Georgia does not have a state "Mini WARN" statute, the Georgia Department of Labor requires that whenever 25 or more workers employed in one establishment are separated on the same day, for the same reason, and the separation is permanent, for an indefinite period, or for an expected duration of seven or more days, the employer or employing unit must, within 48 hours of the separation, furnish the local office of the department Form DOL-402, "Mass Separation Notice (in duplicate)," and a completed copy of Form DOL-402A, "Mass Separation Notice (Continuation Sheet)."[213]

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from the Governor's office); *Oil, Chem. & Atomic Workers Int'l Union v. Am. Home Prods. Corp.*, 790 F. Supp. 1441, 1452-53 (N.D. Ind. 1992) (applying a good faith reduction where, although the employer technically violated the Act, the employer gave previous notice that the plant would be completely shut down by the last quarter of the following year and included a tentative schedule identifying the quarter in which the employer expected to terminate each job grouping).

211. *Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1008 (9th Cir. 2004).

212. *North Star Steel Co. v. Thomas*, 515 U.S. 29, 35 (1995).

213. Ga. Dep't of Labor Reg. 300-2-4-.10, *available at* https://dol.georgia.gov/sites/dol.georgia.gov/files/related_files/document/300_2_4.pdf (last visited Jan. 30, 2020). Georgia Department of Labor Forms DOL-402 and DOL-402A are available in Appendices 1-002 and 1-003 below.