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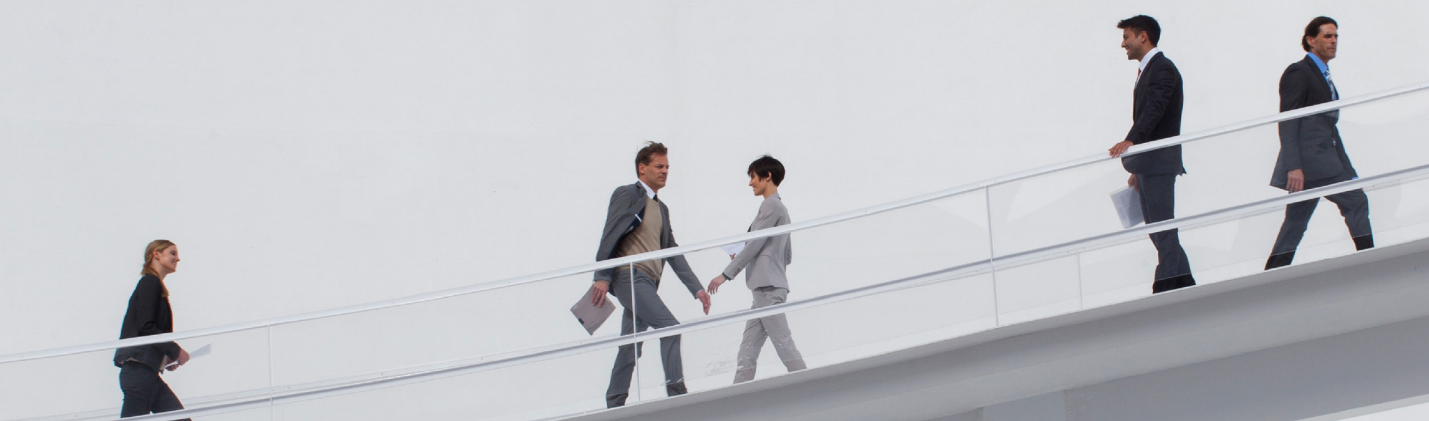
USA – Georgia: Trends & Developments

Shawn Kachmar, Brian Sopp and Robert Hurst
HunterMaclean



USA - GEORGIA

Trends and Developments

Contributed by:
Shawn Kachmar, Brian Sopp and Robert Hurst
HunterMaclean

HunterMaclean has offices in Savannah and St. Simons Island and represents a wide variety of local, regional, national, and international companies and individuals in their legal and business matters in Georgia. HunterMaclean is a business law firm that is committed to its clients and connected to the communities in which its clients do business. The firm has extensive experience representing clients in all areas of litigation as well as corporate, employment, tax, real estate, transportation law, maritime law, information technology, and business planning matters. Firm clients include Fortune 500 companies, banks and hospitals, professional service organisations, industrial development authorities, and non-profit corporations. With 60 attorneys, HunterMaclean's clients receive knowledgeable counsel on all the varied legal issues their industry may face from one comprehensive source.

Authors

Shawn Kachmar is the managing partner with HunterMaclean and practices in the areas of employment law, employee benefits, and business litigation. He has successfully represented public entities and private employers faced with claims under federal and state civil rights laws, as well as a wide variety of business disputes. Shawn also advises employers on employment agreements, executive compensation and ERISA matters, alternative dispute resolution, and restrictive covenants. He serves on the firm's management committee and is a frequent speaker at employment law and human resources seminars and has served as an arbitrator in employment disputes.

Brian Sopp is of counsel in HunterMaclean's Savannah office, where he focuses his practice on employment law. He is an experienced litigator who has successfully defended clients in state and federal courts, up to and including trial. Brian advises organisations regarding employment, benefits, and contract negotiations and disputes. His defence litigation background includes representing medical providers and institutions in medical malpractice, employment, and licensing matters in state and federal court and before state agencies. Brian has successfully represented insurers in federal court in ERISA benefits litigation.

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Robert Hurst is an associate in the Savannah office, where he focuses his practice on business litigation and Georgia property tax issues and appeals. He works with businesses and individuals on a wide variety of general and commercial litigation matters, including product liability, real estate litigation, trust and estate litigation, fiduciary liability, real and personal property tax issues, and contract disputes.

HunterMaclean

200 E. Saint Julian Street
Savannah
GA 31401
USA

Tel: +1 912 236 0261
Fax: +7 912 236 4936
Email: bd@huntermaclean.com
Web: www.huntermaclean.com

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Background and Business Environment

The State of Georgia is located in the Southeastern United States. It has a population of almost 11 million people (eighth largest in the United States) and is growing. Atlanta, a regional and national business hub, serves as the state capital, while the port city of Savannah is one of the busiest ports in the country.

Georgia has a business-friendly legal and regulatory environment. The state focuses on business development through investments in workforce training, infrastructure, real estate development, logistics, and a wide range of tax credits and exemptions. Growth sectors include agriculture, logistics and distribution, automotive, cybersecurity, aerospace, life sciences, and entertainment.

Given Georgia's business-friendly environment, in many contexts, federal law controls, in the absence of more stringent state regulations. The following are seven developments in federal and state law affecting business in Georgia. This list is not exhaustive. Companies looking to do business in Georgia should consult with experienced counsel to ensure compliance with applicable requirements.

Georgia Nonprofit Corporation Code – 2023 Updates and Revisions

The Georgia Nonprofit Corporation was completely recodified in 2023 by the enactment of Senate Bill 148. Extensive efforts were made by the Georgia Nonprofit Law Section Legislative Committee which provided the working draft on which the revised Code was based.

The Committee's stated goals were to clean up and clarify the act, modernise the act and make identified substantive changes. The following is an incomplete list of changes that will impact many non-profit organisations in Georgia.

General provisions

Penalty for Signing False Documents – O.C.G.A. § 14-3-129

New subsections (b) and (c) were added to penalise the signing of false documents consistent with the Model Nonprofit Corporation Act.

Definitions – O.C.G.A. § 14-3-140

New subsections (6) and (7) attempt to modernise the Code to reflect modern titles of chief executive officer and chief financial officer that have become the dominant nomenclature of these positions.

Meetings, action and notice

Meetings – O.C.G.A. § 14-3-820

The 2023 amendment added the second and third sentences in subsection (a); added present subsection (b); and redesignated former subsection (b) as present subsection (c).

- The second and third sentences in subsection (a) state, "[i]f the time and place of a directors' meeting is fixed by the bylaws or the board, the meeting shall be a regular meeting. All other directors' meetings shall be special meetings".
- Subsection (b) states that unless the articles of incorporation or by-laws provide otherwise, the chair of the board or the CEO, or at least 20% of the directors then in office, may call and deliver notice of a special meeting of the board.

Actions taken without meeting – O.C.G.A. § 14-3-821

The 2023 amendment primarily added subsection (b) stating that "a director's consent may be withdrawn by a revocation signed by the director

and delivered to the corporation prior to delivery to the corporation or unrevoked written consent signed by all the directors required for an action to be taken".

It also added subsection (f) which affirmatively allows a director's signature to be electronic when required unless otherwise stated in the articles or by-laws.

Notice – O.C.G.A. § 14-3-822

Notice is now required for any meeting where an amendment to the articles or by-laws or the removal of a director will be considered. The amendment also affirmatively allows for the by-laws to authorise oral notice of meetings of the board of directors.

Committees – O.C.G.A. § 14-3-825

Significant rewrites were made to this code section to make it conform to the Model Act and Business Code counterpart and to authorise the practice of some non-profit corporations of appointing former board members as voting members of director committees.

Directors and officers

Officers are as described in articles or by-laws or as appointed – O.C.G.A. § 14-3-840

This section now affirmatively allows a corporation to have an executive director unless the articles or by-laws state otherwise.

Duties and authority of officers – O.C.G.A. § 14-3-841

This section now affirmatively allows designation of duties and authority in the articles and by-laws by the directors.

Amendment of articles of incorporation and by-laws

Authority of corporation to amend – O.C.G.A. § 14-3-1001

This section added subsections (b) and (c), which state:

- except as provided in the articles of incorporation, a member of a corporation does not have a vested property right resulting from any provision in the articles, including provisions relating to management, control, purpose, or duration of the corporation; and
- subsection (b) of this Code section shall not apply to vested real property rights of members of a corporation, including a property owners' association, established pursuant to a recorded declaration of covenants or any other recorded agreement between the corporation and all its members.

Records and inspection

Members' right to copy and inspect records – O.C.G.A. § 14-3-160

This section added subsection (e) which allows a corporation to impose reasonable restrictions on the confidentiality, use, or distribution of the records that members are entitled to inspect and copy.

Family Care Act extension – O.C.G.A. § 34-1-10

In 2023, Georgia permanently extended its Family Care Act that was otherwise set to sunset later this year. O.C.G.A. § 34-1-10 has been in effect since 2017 and extends state requirements for certain employers to provide paid sick leave to employees to care for their immediate family members. Employers with 25 or more employees who already provide paid sick leave voluntarily are covered by the Act. Employees must work at least 30 hours per week to be eligible for this

paid leave and must be permitted to use up to five days of earned sick leave to care for immediate family members. Georgia's Family Care Act defines immediate family members as children, spouse, grandchildren, grandparents, parents or any dependent on the employee's most recent tax return. For the first time, these protections are permanent.

Smokefree Air Act – O.C.G.A. § 31-12A-2

In 2023, Georgia amended its Smokefree Air Act to include vaping and electronic cigarettes, resulting in the permanent ban of these devices and activities in enclosed places of employment. Prior to 2023, the Act limited its definition of "smoking" to incinerated tobacco products such as cigarettes, cigars, and pipe tobacco. The Act now states that "smoking" includes "use of an electronic smoking device which creates aerosol or vapor or the use of any oral smoking device for the purpose of circumventing the prohibition of smoking".

Pregnant Workers Fairness Act and PUMP for Nursing Mothers Act

While Georgia has not yet passed clear protections for pregnant workers' rights, it has enacted protections for employees to express breast milk at work. Additionally, the Department of Public Health (DPH) advocates for Breastfeeding Friendly Workplaces and designates itself as a benchmark for compliance. Georgia DPH policy encourages and supports all practices in compliance with state and federal law. To that end, two recent federal laws went into effect that will impact many private employers and all public employers both in Georgia and nationwide.

O.C.G.A. § 34-1-6 does provide that any employer in Georgia with one or more employees shall provide reasonable unpaid break time each day to an employee to express breast milk for her infant child. The employer may make reasonable efforts to provide a room or other location, other than a restroom, where the employee may pump in privacy. This break time should, when possible, run concurrently with any break time already provided to an employee, but the employer is not required under state law to provide break time under this code section that would unduly disrupt the employer's operations.

The federal Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act was signed into law by President Biden on 29 December 2022, which went into effect in 2023 and extends federal protections to more nursing employees than were previously protected. Under the federal PUMP Act, eligible employees have the right to reasonable break time and a place, other than a bathroom, that is shielded from view and free from intrusion to express breast milk while at work and extends this right for up to one year after the birth of the child. Between the protections provided by the state law and its federal counterpart, most employers are covered by these regulations.

On 27 June 2023, the Pregnant Workers Fairness Act (PWFA) went into effect, providing critical protections for and expanding the rights of pregnant mothers. The Act applies to all public employers as well as to any private employers with more than 15 employees.

The PWFA gives workers an affirmative right to receive reasonable accommodations for pregnancy, childbirth, and related medical conditions, including lactation, unless providing such accommodations would create an undue hardship on the employer.

Examples of reasonable accommodations include light duty or help with manual labour

and lifting, temporary transfer to a safer or less physically demanding position, allowing pregnant workers to carry a water bottle, changing or adaptation of dress codes, modifying work schedules, providing a stool to sit on, and longer and/or more flexible breaks for water, food, rest, or lactation needs.

Each employee may require different accommodations, and employers should treat each case or request individually. Under the PWFA, an employer must have a good-faith conversation with a worker who is seeking reasonable accommodation about the worker's needs and what reasonable accommodations could help to meet those needs. Employers must respond to requests for reasonable accommodations interactively and promptly.

Undue hardship is determined by factors including, but not limited to, the cost to the employer and the relative financial resources of the employer. Generally speaking, the larger a company is, the higher the threshold is to show that an accommodation rises to undue hardship.

A pregnant or postpartum employee does not need to have a pregnancy-related disability in order to receive an accommodation under the PWFA. This is a distinct change from prior law. An employer cannot deny a pregnant worker employment opportunity, and a pregnant employee may not be forced to take leave when another reasonable accommodation could help to keep the worker on the job.

Finally, the law makes it illegal to discriminate or retaliate against a pregnant worker for requesting or actually utilising accommodations. Employers should be aware of their new obligations under the PWFA. The PWFA further authorises the US Equal Employment Opportunity Commission (EEOC) to make rules within two years of enactment of the PWFA; so, employers should check back to ensure they are fully compliant with the law as enacted.

Non-competition Agreements

On 23 April 2024, the Federal Trade Commission issued a Final Rule prohibiting for-profit employers from entering into new non-competition agreements with employees, including senior executives, and with independent contractors. Existing non-competition agreements with senior executives earning more than USD151,164 remain enforceable but employers must notify all other employees that existing non-competition agreements are unenforceable as of the effective date of the new rule, which is 120 days after publication in the Federal Register.

The Final Rule does not apply to sales of businesses. And while it generally does not apply to non-profit entities, the FTC noted that some "entities that claim tax-exempt nonprofit status may in fact fall under the Commission's jurisdiction". Holding tax-exempt status under the Internal Revenue Code is meaningful, but not dispositive. Physician-hospital organisations, independent physician/practice associations, and non-profits that pay unreasonable compensation to founders, board members, and other insiders were singled out as potentially being subject to the Final Rule.

The FTC's guidance also notes that while other clauses typically accompanying non-competition provisions, like non-solicitation and confidentiality provisions, are not categorically prohibited, they may violate the Final Rule if they are functionally overbroad or onerous.

Given clear state law that favours enforcement of non-competition agreements (see Georgia's

Restrictive Covenants Act, OCGA § 13-8-50 et seq.) the uncertainty created by the FTC rule is particularly concerning for Georgia employers.

Lawsuits challenging the new rule will likely delay or preclude its implementation. Nevertheless, companies should review the new rule, including its exceptions, and develop strategies to prepare for its implementation, including a thorough review of current contracts and the use and substance of restrictive covenant clauses moving forward.

Fair Labor Standards Act Update

On 23 April 2024, the US Department of Labor announced a Final Rule increasing the salary thresholds for the Executive, Administrative, and Professional exemptions from overtime pay requirements under the Fair Labor Standards Act (FLSA) and an increase in the salary threshold for highly compensated employees. Rules requiring that employees in these classifications be paid on a salary basis and meet certain job duty requirements remain unchanged. The salary threshold changes for the Executive, Administrative, and Professional exemptions will increase from USD35,568 to USD43,888 on 1 July 2024, and to USD58,656 on January 2025. The Highly Compensated exemption will increase from USD107,432 to USD132,964 on 1 July 2024, and USD151,164 on 1 January 2025.

Georgia does not have a state Wage and Hour law of general applicability, and therefore, Wage and Hour compliance in Georgia focuses on the requirements of the FLSA. The DOL's updated salary thresholds will likely affect the classification of a large number of employees in Georgia. As such, employers should review current employee classifications and develop strategies to prepare for the current 1 July 2024, implementation of the new Final Rule.

National Labor Relations Act

Georgia is one of the most pro-business jurisdictions in the United States. Georgia is a "right-to-work" state, which means that the right to work cannot be conditioned upon joining or not joining a union. However, like many right-to-work states, in recent years Georgia has seen an increase in union activity as well as an increase in investigations and complaints by the NRLB against non-unionised employers as the National Labor Relations Board (NLRB) becomes more aggressive.

One recent decision of the NLRB has increased the potential for private employers to be subject to unfair labour practices claims before the NLRB. Specifically, in Stericycle, Inc and Teamsters Local 628 (2 August 2023), the NLRB adopted a new standard for the lawfulness of work rules – they are presumptively unlawful if they have a reasonable tendency to chill employees from exercising their rights under the NLRA ("the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"). The employer may rebut the presumption by proving that the rule advances a legitimate and substantial business interest, and that the employer is unable to advance that interest with a more narrowly tailored rule.

This is how the new standard will be applied: "Our standard requires the General Counsel to prove that a challenged rule has a reasonable tendency to chill employees from exercising their Section 7 rights. We clarify that the Board will interpret the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who

also contemplates engaging in protected concerted activity. Consistent with this perspective, the employer's intent in maintaining a rule is immaterial. Rather, if an employee could reasonably interpret the rule to have a coercive meaning, the General Counsel will carry her burden, even if a contrary, noncoercive interpretation of the rule is also reasonable. If the General Counsel carries her burden, the rule is presumptively unlawful, but the employer may rebut that presumption by proving that the rule advances a legitimate and substantial business interest, and that the employer is unable to advance that interest with a more narrowly tailored rule. If the employer proves its defense, then the work rule will be found lawful to maintain."

Employers should review their policies and handbooks with this new standard in mind and with a particular focus on rules regarding confidentiality, communication, and social media.

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