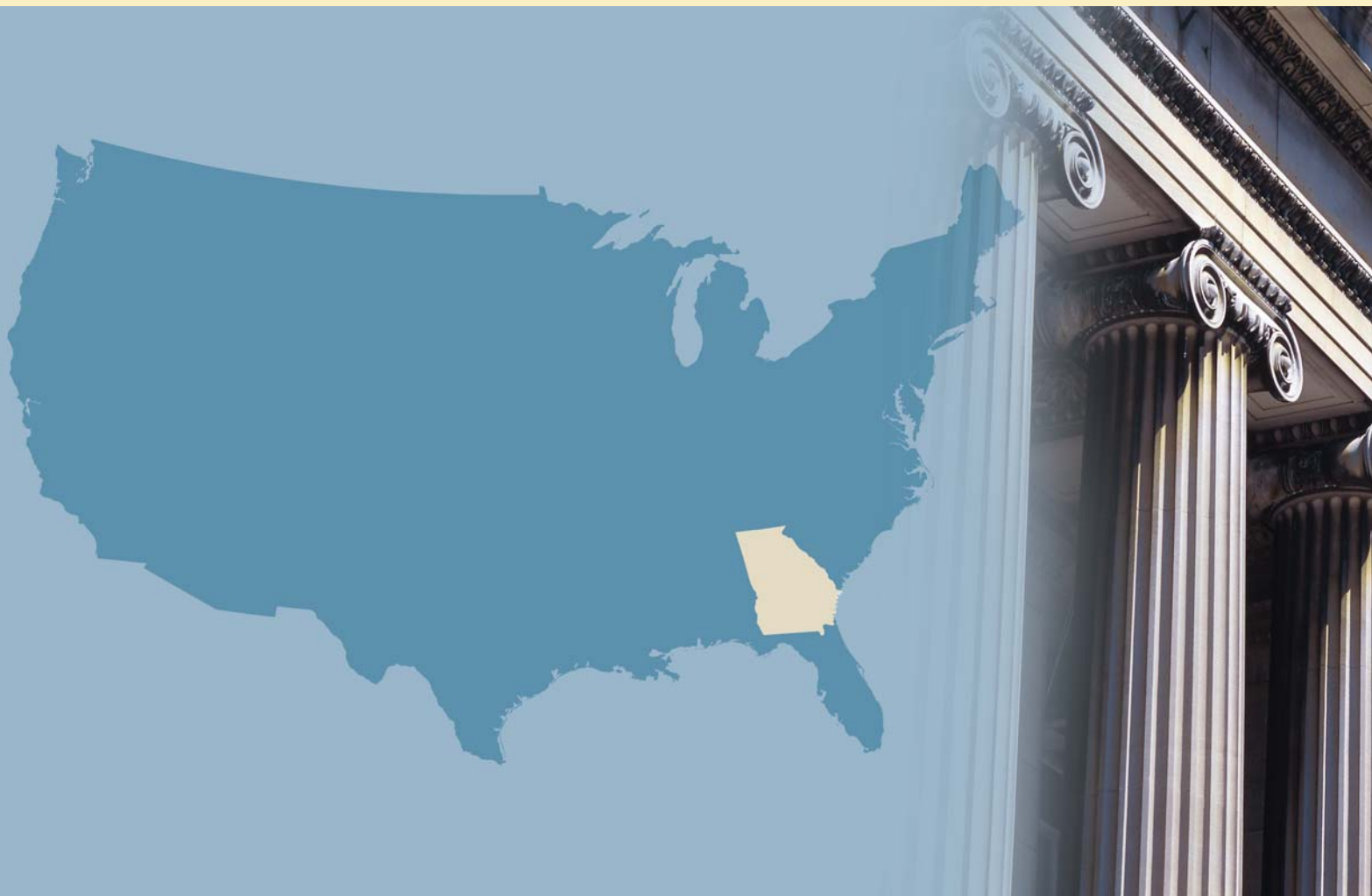


Labor and Employment Laws in the State of Georgia



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This booklet is intended to provide an overview of the most important parts of Georgia state employment laws. It is not intended to be legal advice for any specific situation or set of facts. Whenever you are dealing with any employment related situation it is always a good idea to seek the advice of competent legal counsel.

I. INTRODUCTION

In this book, we discuss most of the significant Georgia laws regulating the employment relationship in the private sector. Some of these laws apply to all Georgia employers while others apply only to particular employers. (When we refer to “you,” the law is applicable to any Georgia employer.) References are to the Official Code of Georgia Annotated, cited as O.C.G.A.

Although we focus on Georgia State law, we also mention and analyze federal laws to a limited extent. Generally speaking, if federal and state laws overlap, the law offering the greater protection to employee rights will govern. Most significant federal employment laws are covered in a separate series of booklets also published by Fisher & Phillips LLP.

No booklet can serve as a substitute for legal counsel. You should consult an attorney at Fisher & Phillips or other competent labor and employment counsel for legal advice concerning any specific situation.

II. EMPLOYER RIGHTS

A. Right To Discharge Employees “At-Will,” O.C.G.A. § 34-7-1

1. The “At-Will” Statute

In Georgia, employees are presumed to be “at-will” employees who may be discharged or may quit for any reason not specifically prohibited by law. The “at-will” presumption is very strong in Georgia because it is codified by statute. Under that statute, the presumed duration of the employment relationship is the length of the first pay period. For example, if you hire an employee for an indefinite period and pay the employee every month, a one-month contract of employment is presumed. After the expiration of the first pay period, you may end the employment relationship “at-will.”

2. Wrongful Discharge Lawsuits Generally Not Permitted

Because the at-will concept is so strong, Georgia courts have dismissed all “wrongful discharge” claims unless a statute:

- applies to the employer at issue;
- specifically prohibits the type of discharge at issue; and
- specifically authorizes a civil lawsuit against violators.

These requirements severely limit the types of viable wrongful discharge claims because most of the relatively few Georgia statutes restricting discharge either do not specify any remedies or authorize only criminal sanctions or fines.

3. Effect Of Employment Agreements And Employee Handbooks, O.C.G.A. § 34-7-1 (Generally)

The employee and employer may change the “at-will” presumption by negotiating an employment agreement that provides that the employee will be employed for a definite period of time during which time he or she cannot be discharged without good cause. (If the employment agreement is for a definite period of time but does not specify grounds for early termination, then a good cause requirement is implied.) Under the Statute of Frauds, an employment agreement lasting for one year or longer must be written and signed in order to be enforceable. Letters offering employment have been held to constitute an employment contract, so such letters should be carefully drafted and reviewed by labor counsel.

Under Georgia law, unlike the law in many other states, a plaintiff cannot use the provisions of an employment handbook or other personnel policy to show that he or she:

- is guaranteed employment for a particular length of time;
- cannot be discharged or disciplined “at-will”; or
- was wrongfully discharged.

By contrast, a promise in the handbook or policy to provide a particular benefit may be enforceable. Georgia courts have held that promises of disability, vacation, and severance pay in handbooks and other policy manuals are enforceable. Therefore, when preparing a handbook or policy you should:

- include a prominent disclaimer explaining that it is only a guideline, that it does not constitute an employment contract, and that the procedures listed therein may be deviated from at any time;
- note that, for any list of grounds for discharge, the list is not all-inclusive;
- avoid using language such as “good cause” or “rights”; and
- provide all benefit information in a separate document.

B. Right To Test Employees

1. Drug And Alcohol Testing, O.C.G.A. § 45-20-90 et. seq.

While this statute appears to permit drug and alcohol testing of employees and applicants, the federal Americans with Disabilities Act (ADA) prohibits pre-hire alcohol testing. The ADA permits post-employment alcohol testing of employees only when such tests are job related and consistent with business necessity. All types of drug testing (random, reasonable suspicion, post-accident, etc.) are permissible. You should, however, provide advance notice of testing policies and follow reasonable procedures to ensure the privacy of the employee or applicant. Furthermore, a provision of the federal ADA offers limited protection to recovering alcoholics

and drug addicts, so you should be familiar with and follow its requirements if the ADA applies to your company. (See Section III. C below for more information on the ADA.)

The Georgia Drug-Free Workplace law requires employers with government contracts totaling \$25,000 or more to certify that they maintain a drug-free workplace. This law does not require drug testing but does require that employees be advised in writing that 1) the sale or use of controlled substances is prohibited in the workplace and 2) specified disciplinary actions will be imposed on those who violate the policy. The contractor must also notify employees about any available drug counseling, rehabilitation, and employee assistance program offered by the employer and require employees to give notice within five days of any criminal drug statute conviction for a violation occurring in the workplace.

If an employer establishes a “drug-free workplace program” in compliance with state law, the employer is eligible for a discount on its workers’ compensation insurance. The program must include all of the following:

- a written notice advising applicants and employees that they will be subject to testing;
- a written policy statement disseminated to employees explaining the types of testing that will be conducted, how results will be kept confidential, disciplinary action that will be taken for confirmed test results or for refusing to take a test, the employee assistance program, and how to contest the results;
- testing of all applicants;
- testing of any employee who is reasonably believed to be using drugs or alcohol based on observable facts;
- testing of any employee who causes a workplace injury resulting in loss of work time;
- testing of any employee after he or she completes a rehabilitation program;
- proper collection and testing procedures;
- maintenance of an employee assistance program or a resource file of independent assistance providers;
- semi-annual drug/alcohol abuse education programs for employees; and
- training of supervisors concerning how to handle drug/alcohol abuse.

2. AIDS Testing, O.C.G.A. § 31-22-9.2 And § 24-9-47

Although Georgia’s AIDS Confidential Information law permits you to require applicants and employees to submit to an HIV test by an approved clinical laboratory, the Americans with Disabilities Act (ADA) prohibits you from requiring applicants to take such a test and you may not test an employee for AIDS unless doing so is job related and consistent with business necessity. Moreover, the ADA would prohibit you from disclosing the employee’s test results. You must report each confirmed positive HIV test to the Georgia Department of Human

Resources. This report must include the age, race, sex, and county of residence but cannot include any other identifying characteristics of the infected person.

Under a separate law, it is a misdemeanor for any person or entity (including employers) to disclose AIDS test results or any other confidential information about AIDS.

3. Polygraph Testing

You may use polygraph tests only in very limited circumstances. While Georgia law no longer restricts employers' use of polygraph testing, the federal Employee Polygraph Protection Act prohibits most employers from using such tests in the employment context except in very limited situations, such as theft or espionage. For more information on the federal law, see the U.S. Department of Labor's website at www.dol.gov/dol/compliance/comp-eppa.htm.

C. Right To Restrict Post-Employment Activities

To protect your business interests, you may require applicants or current employees to agree to restrain their activities after their employment has terminated. Georgia law does not favor post-employment restraints, however, because the Georgia Constitution forbids "contracts in general restraint of trade." Therefore, Georgia courts will not enforce post-employment restraints if they are legally defective in any manner. Accordingly, post-employment restrictive agreements should be drafted very carefully and reviewed annually by labor counsel.

Non-competition agreements prevent former employees from competing against their former employers in the employer's line of business or from performing the same or similar tasks for a different employer. Georgia courts will enforce a non-compete agreement only if it is reasonable in time, duration, territorial scope, and scope of activities restricted. Generally, a non-compete agreement should:

- be effective no more than two years after the employment relationship terminates;
- extend only to geographic areas where the employee actually worked; and
- restrict only those activities or services that the employee performed for the employer.

Non-solicitation agreements prevent former employees from contacting the employer's customers. The law concerning such agreements is similar to the law concerning non-compete agreements. Non-solicitation agreements should:

- last no longer than two years after cessation of the employment relationship;
- prohibit contact only with recent customers or clients with whom the employee actually dealt; and
- prohibit the employee from actively attempting to communicate with such customers.

Non-recruiting agreements prevent former employees from recruiting the employer's remaining employees. The relatively sparse case law concerning such provisions indicates it should be reasonable with respect to time, territory, and proscribed territories.

Non-disclosure agreements stop former employees from disclosing or using the employer's trade secrets or confidential business information. To determine whether such an agreement is reasonable, courts consider its duration and the types of materials it protects. Former employees can be prohibited from disclosing trade secrets forever. However, limitations on disclosure of confidential business information should have an expiration date, although such limitations may last longer than those permitted for non-compete and non-solicitation agreements.

D. Right To Compel Arbitration Of Employment Disputes, O.C.G.A. § 9-92, § 9-9-3

Arbitration is a non-judicial method of resolving legal disputes, including employment disputes, and is usually more efficient and less expensive than litigation. The legal and factual issues are decided by a private arbitrator chosen by the parties. If the parties do not designate the arbitrator or arbitration agency whose rules will apply, the default provisions of the act will apply. In most cases, the employer should agree to pay for the costs of the arbitration, including the arbitrator's fees.

Since most issues concerning the use of arbitration in the employment context have been resolved by the U.S. Supreme Court, you may now lawfully compel applicants and current employees to sign arbitration agreements without providing any additional consideration. You may also refuse to hire applicants or discharge current employees who refuse to sign such agreements. However, mandatory employment arbitration programs and agreements should be reviewed by experienced labor counsel to ensure their enforceability. (You may also wish to consider voluntary arbitration programs.)

Employment arbitration agreements for most employees are regulated by the Federal Arbitration Act (FAA). The Georgia Arbitration Code applies only to the relatively few categories of employees who are directly involved in the movement of goods in interstate commerce (e.g. truck drivers). Under both laws, a written arbitration agreement is enforceable. The FAA does not require the agreement to be signed, but the Georgia law (again applicable only to those employees exempt from FAA coverage) does require that an arbitration clause in an employment contract be initialed by both parties. If the employee refuses to arbitrate an employment dispute (a breach of employment contract or discrimination claim, for example), both laws permit the employer to obtain a court order compelling arbitration of the claim.

Although both acts permit appeal of adverse arbitration decisions to the courts, reversals are relatively rare since grounds for appeal are limited. Appeals usually require a showing that the decision was procured by fraud or that the arbitrator was biased or overstepped his or her authority.

III. EMPLOYER OBLIGATIONS

A. Time Off

1. Judicial Proceedings, O.C.G.A. § 34-1-3 And § 16-10-93

Under Georgia law you must excuse employees from work to attend judicial proceedings in response to a subpoena, summons for jury duty, or other court order. This requirement does not apply to an employee charged with a crime. The employee must abide by your rules requiring advance notification of attendance at judicial proceedings. An employee who is disciplined or discharged in violation of this law may sue for damages and attorney's fees.

Another law prohibits anyone from deterring witnesses from testifying by making threats, including threatening the employment of the witness or employment of any relative or associate of the witness. Violators risk jail sentences of between one and five years.

2. Military Leave, O.C.G.A. § 38-2-280

Georgia law requires you to return to work in the same or a similar position those non-temporary employees who perform military service or training (not to exceed six months within any four-year period). To qualify, the employee must:

- receive a certificate of completion of military service;
- remain able to perform the duties of the position; and
- apply for reemployment within 90 days after being relieved from service.

If qualified, the employee must:

- be restored without loss of seniority;
- be allowed to participate in insurance or other benefits consistent with the employer's ordinary rules for leave of absence; and
- not be discharged from the position without cause for one year after the restoration.

The law authorizes any aggrieved employee, who may be represented by the state Attorney General if the case is meritorious, to sue for reinstatement and loss of wages.

The federal Uniformed Services Employment and Reemployment Rights Act (USERRA) applies to all employers and has similar but much more detailed provisions than state law. Since it preempts the state law to the extent that it offers greater protections, you should be familiar with and follow its provisions and regulations. More information about USERRA is available on the federal Department of Labor's website at www.dol.gov/dol/compliance/comp-userra.htm.

3. Time Off For Voting, O.C.G.A. § 21-2-404

Georgia law requires you to give employees up to two hours off to vote in any election for which the employee is registered and qualified. This law is not applicable if the employee commences work more than two hours after the opening of the polls or leaves work more than two hours prior to the closing of the polls. You may specify the particular hours that an employee can be absent.

4. Break Time For Natural Feeding, O.C.G.A. § 34-1-6

This Georgia law states that “an employer may provide reasonable unpaid break time each day to an employee who needs to express breast milk for her infant child [and] may make reasonable efforts to provide a room or other location (in close proximity to the work area), other than a toilet stall, where the employee can express her milk in privacy.” However, because the law is written in permissive terms (*i.e.* “may” instead of “must”) and does not specifically authorize a civil action, it appears to impose no enforceable obligations on Georgia employers.

5. Family And Medical Leave

Georgia has no law requiring employers to provide leave to employees for medical or family reasons. However, the federal Family and Medical Leave Act (FMLA) requires employers with 50 or more employees to provide qualifying employees up to 12 weeks of unpaid leave each year for specified medical or family reasons and prohibits covered employers from discriminating or discharging employees for taking such leave. Additional information on the FMLA is available in a separate booklet published by Fisher & Phillips.

B. Wage And Salary Requirements

1. General Requirements, O.C.G.A. § 34-4-1

Georgia’s wage payment provisions require all employers, except those engaged in the farming, sawmill, and turpentine industries, that employ skilled or unskilled workers in manual, mechanical, or clerical labor to make wage or salary payments to the employees or their representatives by cash or check. Direct deposit is allowed with employees’ consent. Officials, superintendents, or other heads or subheads of departments may be paid on a monthly or less frequent basis, but all other employees must be paid on a semi-monthly or more frequent basis.

2. Minimum Wage And Overtime, O.C.G.A. § 34-4-3

Georgia’s minimum wage law applies only to employers *not* covered by the federal Fair Labor Standards Act. (FLSA). Employers that have annual sales of \$40,000 or less, employ five or fewer employees, solely employ domestic employees, or are farm owners, sharecroppers, or land renters are specifically exempt from coverage. Currently, nonexempt employers must pay employees a minimum wage rate of \$5.85 per hour and maintain wage and time records. The minimum wage does not apply to employees paid wholly or partly by tips, high school or college students, newspaper carriers or certain resident child-care or nursing-care providers. If an employer fails to pay the minimum wage, the employee may bring a lawsuit against the employer and recover back wages, plus liquidated damages, court costs and attorney’s fees.

The FLSA with certain exceptions, applies to employers employing two or more employees and having \$500,000 in annual sales. It also applies specifically to certain categories of employees. The FLSA currently requires covered employers to pay non-exempt employees a minimum wage of \$5.85 an hour and overtime pay of 1.5 times the regular rate of pay for each hour worked in excess of 40 in one week. Employees engaged in executive, administrative, or professional capacities and paid on a salary basis exceeding \$250 a week are exempt from the overtime requirement. (Caution: the federal minimum wage goes up to \$6.55 an hour and then to \$7.25 an hour on July 24, 2008 and July 24, 2009, respectively.) The FLSA also prohibits retaliation against employees because they have filed or participated in FLSA lawsuits. Additional information on the FLSA is available in a separate booklet published by Fisher & Phillips.

3. Commissions, O.C.G.A. § 10-1-702

Commissions must be paid according to the terms of the sales representation agreement. Forfeiture provisions are enforceable if they are clearly and unambiguously part of the agreement. For example, a Georgia court upheld a policy that denied commissions otherwise earned and due to an employee who quit to join a competitor. The employer cannot recover commission advances to an employee absent express agreement to the contrary. For these reasons, you should use a clearly written and detailed commission agreement for sales representatives. A sales representative must sue for breach of contract to recover unpaid commissions and, unlike a lawsuit for recovery of minimum wages, is not automatically entitled to recover attorney's fees.

Georgia law offers special protections to sales representatives for wholesale products. They must be paid all commissions owed within 30 days after termination of the sales representation contract. This right cannot be waived by contract. Aggrieved sales representatives may recover double damages and attorney's fees but may be assessed the employer's attorney's fees if the court determines that the lawsuit is frivolous.

4. Vacation Pay

You are not required to provide vacation time or vacation pay. You may also provide that terminating employees forfeit accrued but unused vacation time. However, any such policy must be clearly communicated to employees through handbooks or other published policies.

5. Bonuses

Bonuses must be paid according to the terms of the employment agreement and the employer's policies. For example, an employee who quits prior to the end of the year has no right to a bonus if the employment agreement and/or the employer's policies limit bonuses to those employees who are employed at the end of the year. A promise to pay a bonus is not enforceable if the amount is not specified or reasonably calculable (e.g. a portion of net revenue).

C. Unemployment Compensation, O.C.G.A. § 34-8-3

Georgia's unemployment compensation law provides temporary income to replace a portion of the wages of able-bodied workers who have lost their jobs through no fault of their own. Employers pay for the program through state and federal tax assessments based on the employer's "experience rating." The fewer the number of former employees who have been paid unemployment compensation benefits, the lower the employer's experience rating is.

The employer must complete a separation notice form explaining why the employee was terminated. That form must then be submitted to the Georgia DOL and the separated employee. Based on information obtained from the claimant and employer, a DOL claims examiner makes the initial determination of whether the claimant is eligible for unemployment compensation. That determination is final unless either party timely contests it. If contested, a hearing officer conducts a relatively informal evidentiary hearing where both parties may present testimony and supporting documents. Either party may appeal the decision of the administrative law judge to the Board of Review. A further appeal to the local Georgia Superior Court is also available. Such appeals are rare, however, and they are seldom successful since the Board's decision will be upheld if there is "any evidence" to support it.

Generally, claimants who voluntarily *quit* are not eligible for unemployment compensation benefits unless they show that the employer changed the work conditions such that no reasonable employee would have continued employment. But a claimant who quits to accompany a spouse who has been relocated from one military assignment to another is still eligible for benefits. Any claimant who turned down another job, without good reason, will also be found ineligible.

If a claimant has been involuntarily discharged, the employer has the burden of proving that the discharge was for "good cause." The regulations (300-2-9-.01 *et. seq.*) establish detailed standards for good cause in several common situations. For example, if the employee was discharged for fighting or for threatening behavior on the employer's premises or while on the job, the following "good cause" factors must be considered:

- whether the discharged employee used a weapon;
- whether anyone was injured;
- the extent of any provocation of the discharged employee;
- whether the discharged employee had previously been warned about fighting.

D. Wage Deductions

1. Garnishment Of Wages For Creditors, O.C.G.A. § 18-4-20(d)

A garnishment order obtained by a creditor requires employers to withhold income from the pay of employee debtors. Garnishment of wages for unpaid creditors may not exceed the lesser of a) 25% of the employee's disposable earnings (after taxes and certain other withholdings) during a workweek, or b) the amount by which the employee's disposable

earnings exceed 30 times the federal minimum wage (currently \$5.85 per hour, and will increase to \$6.55 per hour and then to \$7.25 on July 24, 2008 and July 24, 2009, respectively).

When an employer-garnishee receives a summons of garnishment from the garnishor, the employer must file an answer and serve a copy of the answer on the creditor within 45 days of the service of the summons. In the answer, you must describe what money or other property is subject to garnishment. **It is very important to file a timely answer.** If you fail to do so, you may be liable for the entire amount of the employee's debt.

You must withhold the legally-required amount of disposable earnings from each paycheck and pay such amount to the court every 45 days for 180 days or until the full amount is paid, whichever comes first. For each payment to the court, you may retain as an administrative fee the greater of \$25 or ten percent of the amount paid to the court, but the fee cannot exceed \$50.

If the employee quits or is fired before the debt is fully paid, you must file a final answer stating the date and reason for the termination and the former employee's present home address and employer, if known.

2. Garnishment For Family Support, O.C.G.A. § 18-4-20(f)

If the garnishment order concerns alimony or child support, up to 50% of the employee's disposable earnings may be withheld. There is no time limitation for such an order. The payment recipient, deadlines for payment, and administrative fees you may charge will vary depending on whether the order is an income deduction order, an order for garnishment, or an order for continuing garnishment. Follow the directions of the order.

3. Garnishment For Student Loan Creditors

The federal Higher Education Act provides that each holder of a defaulted student loan is entitled to 10% of that person's disposable earnings, not to exceed 25% total for multiple student loan garnishments, unless the employee agrees to a greater percentage garnishment. You may not assess any administrative fee for this wage deduction.

4. Multiple Garnishment Orders

Withholding orders should be honored in the following order: 1) child support, 2) taxes, 3) student loans, 4) spousal support, 5) state taxes, and 6) other garnishments and wage assignments. However, because multiple garnishment orders involve complex legal issues (including whether a person subject to multiple garnishments can be discharged), you should consult a qualified employment law attorney for assistance.

E. Child Labor Restrictions, O.C.G.A. § 39-2-3, § 39-2-7

Georgia law substantially restricts employment of minors (defined as anyone under the age of 18). Minors under 12 years cannot work, except in agriculture, domestic service in private homes, or employment by a parent or guardian. Minors between 12 and 16 cannot work:

- more than four hours on a school day;
- more than eight hours on days other than school days;
- more than 40 hours in any week;
- during school hours (unless the minor has completed senior high school or has been excused from attendance);
- between 9:00 p.m. and 6:00 a.m.; or
- in the following occupations or industries: manufacturing, mills, factories, laundries, workshops, machinery, messenger service, motor vehicles, equipment, food processing, fixtures, railroads, unguarded gears, vessels or boats, dangerous gases or acids, communication, public utilities, freezers, meat coolers, loading and unloading trucks, railroad cars, conveyors, warehouses, scaffolding or construction, mines, coke breaker, coke ovens, or quarries.

Minors under 16 can sell or deliver newspapers in residential areas between the hours of 5:00 a.m. and 9:00 p.m., subject to the preceding limitations.

Minors 14 years or older may be employed during the vacation months in the care and maintenance of lawns, gardens, and shrubbery owned or leased by the employer of such minor, provided the minor is covered by an accident and sickness insurance plan or a workers' compensation insurance policy or plan provided by the employer.

Minors must obtain a work certificate from the school superintendent or other authorized person for each job. Minors 16 and 17 years old may obtain a permanent identification card. Employers must inspect and keep copies of the work permit or identification card. Within five days of the termination of employment of any minor under 16, or within 30 days of such a minor's failure to appear for work, the employer must return the employment certificate to the issuing officer of the Georgia DOL.

Any violation of Georgia's child labor laws is a misdemeanor. Such violations are also subject to an injunction to prevent the employer from continuing to employ the minor at issue.

The federal Fair Labor Standards Act also restricts child labor. If the employer or employee is covered both by Georgia law and the FLSA, the more protective law applies.

F. Maintenance Of Records/Employee Access To Records, O.C.G.A. § 34-2-11

You must keep for at least one year accurate records of the name, address, and occupation of each employee, their daily and weekly hours worked, and the wages paid to them.

You have no obligation under Georgia law to grant employees access to their personnel or medical files. The federal Americans with Disabilities Act, however, requires that covered employers maintain medical files separately and treat them as confidential records.

G. Workplace Safety And Health

1. Workers' Compensation, O.C.G.A. § 34-9-1 et. seq.

The Georgia Workers' Compensation Law applies to employers of three or more part-time or full-time employees. Such employers must either obtain workers' compensation insurance coverage or be qualified as a self-insurer. Coverage must include medical and disability benefits to employees who suffer employment-related injuries that result in partial or total incapacity or death. In return for providing such coverage, the employer is shielded from tort liability for these injuries.

Covered employers are required to post information identifying the medical panel of physicians or the managed care organization. All authorized doctor bills, hospital bills, physical therapy, prescriptions, rehabilitation, and necessary travel expenses must be paid by the employer or its insurance company. Employees incapacitated for more than seven days are entitled to two-thirds of their average weekly wages, not to exceed \$400.00 a week. Employees are entitled to receive benefits for up to 400 weeks or, if the injury is catastrophic, for life. Benefits may be reduced if the employee is released to return to work with limitations or restrictions.

Employees are ineligible for workers' compensation benefits if the injury or death occurred due to the employee's willful misconduct, including intentionally self-inflicted injury, or out of an attempt to injure another, or for the willful failure or refusal to use a safety appliance or perform a duty required by statute. Employees are also ineligible if the injury or death occurred due to intoxication by alcohol or illegal drugs. If the employee refuses to be tested, it is presumed that the injury was caused by the employee's consumption of alcohol or illegal drugs.

If the employer refuses or fails to pay workers' compensation benefits, the employee must file a claim with the Workers' Compensation Board. The employer ordinarily has the burden of proving that the employee is ineligible for benefits. An administrative law judge makes the initial decision. That decision can be appealed to the Board and, if necessary, to the courts.

2. Workplace Violence, O.C.G.A. § 34-1-7

You must furnish employees with a workplace that is reasonably safe from violence. Depending on the circumstances, an employee may be eligible for workers' compensation if he or she is assaulted in the workplace or during work hours.

Georgia law allows you to obtain a temporary restraining order (TRO), effective up to 15 days, against an individual who has committed or threatened violence. You must submit an affidavit that details the violence or threats of violence and shows that you have conducted a reasonable investigation of the allegations. Before the TRO expires, an evidentiary hearing will be held to determine whether an injunction (lasting up to three years) should be granted. The TRO and injunction restrain the defendant from committing violence or threatening violence against an employee while at work or otherwise in the workplace.

3. Workplace Safety Standards, O.C.G.A. § 34-2-10, § 34-7-20 And § 34-7-23

You must furnish a reasonably safe workplace, including providing safety devices and safeguards, and otherwise do everything reasonably necessary to protect the life, health, safety, and welfare of employees. You must warn employees about known latent defects in machinery or the work environment. However, employees assume the ordinary risks of employment and must exercise ordinary skill and diligence to protect themselves.

These general state safety laws are rarely invoked or utilized and are generally preempted by the federal Occupational Safety and Health Act (OSHA) and its regulations, particularly 29 C.F.R. Part 1910 (general industry standards) and 29 C.F.R. Part 1926 (construction standards). OSHA and its regulations require you to furnish a workplace free from recognized hazards that cause or are likely to cause serious harm. You may contest OSHA citations and penalties before an administrative law judge. You may then appeal to the Occupational Safety and Health Review Commission, and, if desired, to the federal appeals courts. Notices of contest must be filed within 15 working days following issuance of citations. OSHA penalties range up to \$70,000, depending on the seriousness of the violation, the size of the employer, and the employer's safety record. Additional information on OSHA is available in a separate booklet published by Fisher & Phillips.

H. Insurance, O.C.G.A. § 33-24-21.1

You are not required to provide life, disability, or health insurance to employees. If you do provide such coverage, however, state and federal laws regulate such coverage.

As to most forms of group accident or insurance coverage, Georgia law requires employers to provide employees with the right to purchase post-termination coverage. The term of such coverage, assuming the individual pays for it, is the fractional policy month remaining at time of termination, plus three additional months. This does not apply if the employee was terminated for cause or if the coverage had lapsed prior to the employee's termination due to the employee's failure to make required payments.

Georgia law also requires that most employees be allowed to convert coverage in effect before their terminations to individual coverage, to be paid at their expense.

The federal COBRA law requires employers having twenty or more employees to allow terminated employees to retain medical coverage at their own cost for eighteen months or more, depending on the circumstances. More information about COBRA is available in a separate Fisher & Phillips booklet.

I. New Hire Reporting, O.C.G.A. § 19-11-9.2

Georgia law requires you to report within ten days of their occurrence the following events: hiring of all (new or former) employees, and all (new or former) employees who are laid off, furloughed, separated, granted leave without pay, or terminated. You must report such events

by mailing the employee's copy of the W-4 form or other authorized identification to the Georgia Department of Administrative Services. The report must contain:

- the employee's name, address, social security number, and date of birth; and
- the employer's name, address, and employment security number or unified business identifier number.

You can register new hires on the Internet at www.ga-newhire.com.

J. "Multiracial" Classification On Forms, O.C.G.A. § 34-1-5

This statute calls for employers to include a "multiracial" classification on written forms and questionnaires that request information on the racial or ethnic identification of employees. However, because the statute expressly states that violation of the statute does not create a cause of action, it is unclear whether you must do this.

K. Notice Of Mass Layoffs And Plant Closings, Ga. Reg. 300-2-7-.09(1)

You must notify the state Department of Labor within 48 hours if you discharge or lay off 25 or more employees from the same establishment.

The federal Worker Adjustment and Retraining Notification (WARN) law requires employers with 100 or more employees to give workers 60 days advance notice of plant closings or mass layoffs, as those terms are defined by that law. Additional information on WARN is available on the federal Department of Labor's website at www.dol.gov/dol/compliance/compwarn.htm.

IV. PROHIBITED DISCRIMINATION

A. Race, Gender, And National Origin

Georgia has no laws prohibiting employment discrimination on the basis of race, gender (including sexual harassment), or national origin. Title VII of the federal Civil Rights Act of 1964, which covers employers with fifteen or more employees, however, does prohibit such discrimination and retaliation against employees who oppose unlawful discrimination or who participate in Title VII proceedings. Title VII allows plaintiffs to sue for back wages, reinstatement or front pay, and attorney's fees. Plaintiffs may also recover compensatory and punitive damages, the combined amount of which may range up to \$300,000 (depending on the size of the employer), and are entitled to a jury trial.

Prior to filing a lawsuit under Title VII, an employee in Georgia must file a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged discriminatory event and allow the EEOC to investigate the charge for at least 180 days. A race discrimination plaintiff has the option to skip the EEOC process and file suit directly in court

pursuant to the federal Civil Rights Act of 1866, which applies to all employers and allows the same types of relief as Title VII plus unlimited punitive and compensatory damages.

B. Equal Pay, O.C.G.A. § 34-5-3, § 34-5-6

Georgia's "Sex Discrimination in Employment" law requires employers with 10 or more employees to pay the same wage rate to both males and females for equal work in jobs that require equal skill, effort, responsibility and that are performed under similar working conditions. This requirement does not apply if such payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any factor other than sex. Covered employers may not retaliate against any employee for complaining about matters relating to sex discrimination or for instituting or testifying in a legal proceeding related to sex discrimination.

The State Commissioner of Labor has the right to investigate equal pay complaints, assist employers with compliance with the law, and eliminate unlawful practices through informal conference. Any aggrieved employee may sue to recover wages and reasonable attorney's fees, not to exceed 25 percent of the judgment, but must do so no later than one year after the cause of action accrues. The parties may elect to follow special arbitration procedures. Covered employers are required to post a copy or abstract of this law.

The federal Equal Pay Act (EPA), which is part of the Fair Labor Standards Act (FLSA) and which applies to any employer or employee covered by the FLSA, has similar requirements. It is generally preferred by plaintiffs because it allows more extensive damages (unpaid wages, an additional equal amount as liquidated damages, plus unlimited attorney's fees) than the state law allows.

C. Disability, O.C.G.A. §34-6A-1 et. seq.

Both state law (the Georgia Equal Employment for Persons With Disabilities Code (GEEPDC)) and federal law (the Americans with Disabilities Act (ADA)) protect applicants and employees with disabilities. Because the ADA covers the same range of employers (15 or more employees) as the GEEPDC, provides substantially greater protection to applicants and employees with qualified disabilities than the GEEPDC, requires reasonable accommodation to such individuals (the GEEPDC requires no accommodation), and allows substantially greater damages to plaintiffs, covered employers should exclusively focus their efforts on complying with the ADA rather than with the GEEPDC.

Under the ADA, covered employers cannot discriminate against employees or applicants with a disability (or those whom they regard as having a disability) who, with or without reasonable accommodation, can perform the essential functions of the job at issue. Covered employers must also make reasonable accommodation to employees, including modification of facilities and equipment and job restructuring. More information about the ADA is available in a separate Fisher & Phillips booklet.

D. Age, O.C.G.A. § 34-1-2

Under Georgia statutory law, you may not discriminate against any individual between 40 and 70 years of age solely because of age when the “reasonable demands” of the position do not require an age distinction and the individual is qualified physically, mentally, and by training or experience to satisfactorily perform the work. Convicted violators are guilty of a misdemeanor and subject to fines up to \$250. The Georgia Supreme Court has held that this law does not authorize a civil action for wrongful discharge.

Georgia employers with 20 or more employees are also subject to the federal Age Discrimination in Employment Act (ADEA). Under the ADEA, it is unlawful to discriminate against or discharge an applicant or employee who is forty years or older or retaliate against an individual for opposing employment practices that discriminate based on age or for participating in any way in an investigation, proceeding, or litigation under the ADEA.

E. Religion, O.C.G.A. § 10-1-573

Georgia law requires any business or industry that operates on Saturday or Sunday to make all reasonable accommodations to the religious needs of employees whose regular day of worship falls on a day of work. It is unclear whether this statute imposes any enforceable duty on employers because the statute does not authorize a cause of action or specify remedies or penalties. Because of the imprecise wording of the statute, it is also unclear whether it applies to Muslims (who worship on Fridays). There are no reported cases interpreting this statute.

Georgia employers covered by the federal Title VII law must accommodate the religious belief of an employee or prospective employee, unless doing so would impose an undue hardship, and cannot discriminate against applicants or employees based on their religion. The full range of Title VII remedies is available to plaintiffs asserting religious discrimination or failure to be accommodated.

F. Criminal History, O.C.G.A. § 35-3-34

You may ordinarily base an employment decision on an applicant’s or employee’s criminal record. Employers may obtain criminal history information with written consent of the party being investigated from the Georgia Crime Information Center (on the Internet at www.state.ga.us/gbi/gcic.html). If you make an adverse employment decision based on such records, you must inform the affected person that a record was obtained from the center, the specific contents of the record, and the effect the record had upon the decision; failure to provide such information is a misdemeanor.

Employers cannot disqualify any applicant because that individual has pleaded guilty to a crime if that individual’s plea has been discharged pursuant to the First-Time Offender Law (O.C.G.A. Title 42, Chap. 8), which allows a person who has not previously been convicted of a felony to be placed on probation instead of imprisonment. However, as decided by the Georgia Court of Appeals in 2000 (in a case argued by Fisher & Phillips attorneys), because the statute does not specifically authorize a civil action for its violation, plaintiffs who have been denied

employment for reasons prohibited by the statute cannot assert a wrongful discharge claim. (Note that the Crime Information Center is not allowed to release records of arrests, charges and sentences for crimes covered by the First-Time Offender Law.)

G. Garnishment Orders

State and federal law provides some protection to employees who are subject to garnishment orders. Under Georgia law, you may not discharge an employee because that employee:

- has voluntarily assigned a portion of his or her income for child support (O.C.G.A. § 19-11-20);
- is subject to a garnishment order for any one debt (O.C.G.A. § 18-4-7); or
- is subject to a garnishment order for spousal or child support (O.C.G.A. § 19-633(j)).

The first two of the three state statutes establish no civil remedies or penalties for violations. Federal law, however, has a provision identical to the second law that establishes a penalty of \$1,000 and/or imprisonment for one year for its violation. (No federal court in Georgia has decided whether the federal law allows civil remedies, and other federal courts are split on the issue.) The third state garnishment law mentioned above specifies a penalty of \$250 for the first violation and up to \$500 for each subsequent violation; it does not, however, authorize civil suits to remedy violations.

Federal law prohibits firing any employee because that employee is subject to a student loan garnishment order. An aggrieved employee may sue for back pay, reinstatement, attorney's fees, and punitive damages.

H. Bankruptcy

Georgia law provides no protections for employees who file for bankruptcy. However, federal law provides that employers may not discipline or discharge an employee solely because that employee has filed bankruptcy. The federal courts are split on whether this law protects applicants, as well. Although the statute specifies no remedy, federal courts have generally permitted civil lawsuits for violations.

I. Sexual Orientation

There are no Georgia or federal laws (including Title VII) prohibiting discrimination on the basis of sexual orientation. In 2000, however, the City of Atlanta enacted an ordinance prohibiting discrimination on the basis of sexual orientation, as well as gender identity, domestic relationship status, parental status, and familial status. The ordinance (Atlanta Code of Ordinances, Sec. 94-110 *et. seq.*), which applies to private employers operating in the city with 10 or more employees (including part-time and temporary employees), allows private suits by employees. The Ordinance provides that violations could result in unlimited damages, as well as

revocation or suspension of various city licenses. Whether this ordinance is enforceable is in question. Unless and until a legal challenge to the ordinance is sustained, however, employers operating in the City of Atlanta should be aware of these provisions.

V. TORTS ASSOCIATED WITH EMPLOYMENT

A. Negligent Hire/Retention, O.C.G.A. § 34-7-20

You must exercise ordinary care when selecting employees for hire and discharge any employee who poses a danger to others. Claims of negligent hire/retention are often brought by plaintiffs claiming sexual harassment. To avoid and defeat negligent hire/retention claims, you should:

- require the prospective employee to complete a job application form that includes consent for credit, driver's license, and criminal background investigations and questions concerning whether the applicant has ever been convicted of a crime, including details concerning the type of crime, the date of conviction and the penalty imposed, and whether the prospective employee has ever been a defendant in a civil action for an intentional tort, including the nature of the intentional tort and the disposition of the action;
- make a reasonable effort to contact references and former employers of the prospective employee concerning the suitability of the prospective employee for employment;
- interview the prospective employee.

You should require applicants to sign a separate form authorizing the acquisition of the above-listed information. Under the federal Fair Credit Reporting Act, before taking adverse action based in whole or in part on a credit or background report, you must provide a copy of the report to the employee along with a summary of consumer's rights provided by the credit reporting agency.

B. Defamation, O.C.G.A. §51-5-1 et. seq.

Defamation is a false and malicious communication that is either written (libel) or verbal (slander) to a third person that injures the reputation of another or exposes that person to public contempt or ridicule. Defamation claims often arise in the employment context, particularly when negative evaluations or job references are given. Simply announcing that an employee has been discharged is not actionable defamation.

There are several defenses against a defamation claim, including truth and personal opinion. Limiting the dissemination of any negative information about an employee only to internal employees (*i.e.* supervisors, human resources personnel) who need to know such information to perform their job duties provides a viable defense. Additionally, all communications with the Georgia Department of Labor in connection with unemployment

claims are absolutely privileged. O.C.G.A. 34-8-122(a). Georgia law (O.C.G.A. § 34-1-4) also provides some protection for job references. Employers (and their designated spokesperson) are presumed to be acting in “good faith” when they disclose:

- factual information concerning an employee’s or former employee’s job performance;
- any illegal act committed by such employee; or
- ability or lack of ability to carry out the duties of such job.

This presumption does not apply to information that is disclosed in violation of a nondisclosure agreement or that is confidential as a matter of law. Despite the protections offered by this law, you should obtain a signed written release from the employee requesting the reference before providing a reference.

C. Intentional Interference With Employment Relationship

Both employees and employers frequently sue third parties for interference with an existing or prospective employment relationship. This type of claim often arises when a competitor hires a key employee and the former employer sues the competitor. It also commonly occurs when a former employer gives a negative employment reference. To prevail on such a claim, the plaintiff must show the following:

- an existing or prospective employment relationship (an “at-will” employment relationship qualifies as a contract);
- the defendant is a third party;
- the defendant maliciously caused a breach of the contract or prevented its formation; and
- the plaintiff suffered damages.

Malice requires an independent wrongful act, such as physical violence, fraud, defamation, etc. Because only a third party can interfere with a contract, employees cannot sue their current employers or its managers (or vice-versa) for intentional interference with employment contract/relationship.

You are not liable merely for informing a prospective employee about an available position. If employers are in the same type of business, they may freely attempt to hire each other’s employees. This “competition” privilege constitutes a defense to a claim of interference with employment relationship if the competitor:

- does not employ improper means;
- does not intend to create or continue an illegal restraint of competition; and
- advances its interests in its competition with the other.

D. Breach Of Duty Of Loyalty And Breach Of Fiduciary Duty, O.C.G.A. § 14-2-842 And § 10-6-31

Under Georgia law, all employees owe their employer a duty of loyalty and faithful service. Thus, employees cannot directly compete with their employer's business or solicit customers for a rival business. If they do so, the employer may sue for breach of the duty of loyalty. However, merely planning to work for a competitor does not violate the duty of loyalty.

Managers owe an additional "fiduciary" duty of good faith and loyalty to their employer. Without knowledge and consent of the employer, they cannot make a personal profit from the employer's business or take advantage of business opportunities that properly belong to the employer. An employer may sue a manager for breach of fiduciary duty, may stop paying any compensation owed to such manager, and may recover any compensation paid during the time of breach.

E. Misappropriation Of Trade Secrets And Computer Data, O.C.G.A. § 10-1-762 et. seq.

Georgia's Trade Secrets law allows you to sue former employees, competitors, or other persons and entities who misappropriate the employer's trade secrets. Trade secrets include formulas, programs, devices, methods, techniques, drawings, processes, financial data or plans, product plans, lists of actual or potential customers or suppliers that are not commonly known by or available to the public. The Georgia Computer Systems Protection law (O.C.G.A. Title 16, Chap. 9, Art. 6) also provides criminal penalties and authorizes civil lawsuits against anyone who uses a computer or computer network to, among other things, steal, delete, or alter data; invade the privacy of another; or commit computer forgery.

F. Intentional Infliction Of Emotional Distress

Many employment-related lawsuits include a claim for intentional infliction of emotional distress (IIED). To prevail on such a claim, the plaintiff must meet the "stringent" burden of showing "extreme and outrageous" conduct that caused severe emotional distress. Because the burden of proof is so high, Georgia and federal courts often dismiss IIED claims arising in the employment context. One court has held that such a claim requires some form of physical intimidation that approaches ordinary assault or otherwise "shocks the conscience." The distress must be "so severe that no reasonable person could endure it"; mere humiliation, embarrassment, or fright are insufficient. The mere discharge of an at-will employee, even if false reasons for the discharge are provided, cannot sustain an IIED claim.

VI. LABOR ORGANIZATIONS AND LABOR RELATIONS

A. The National Labor Relations Act

The field of labor relations is primarily governed by the federal National Labor Relations Act (NLRA), which is enforced by the National Labor Relations Board (NLRB). The NLRA allows groups of employees to elect a labor organization to negotiate their wages and working conditions. While employers may express their opposition to unionization, they may not discriminate against employees because of their union activity or past membership. If a union wins an NLRB election, the employer must negotiate in good faith with the union. If the parties negotiate a collective bargaining agreement, the agreement is a fully enforceable contract. More information about the NLRA is available in separate Fisher & Phillips booklets.

B. Protection For Employers From Unlawful Union Acts

The primary economic weapon for unions is the right to strike and picket the employer's workplace. Georgia and federal courts cannot enjoin peaceful strikes or picketing. However, Georgia law (O.C.G.A. § 34-6-1) does offer significant protection from unlawful acts by unions. No person or organization may use force, intimidation, violence, or threats of violence in order to:

- force any person to join or not to join a union;
- force any person to strike or refrain from striking;
- prevent any individuals from leaving or continuing any employment;
- prevent any individuals from accepting or refusing employment by any employer;
- prevent any individuals from entering or leaving any place of employment of such employer;
- prevent any employer from lawfully engaging or continuing to engage in any proper and lawful business activity;
- prevent any employer from properly, lawfully, or peaceably using or enjoying his property used or useful in the conduct of such business;
- prevent any employer from acquiring materials or supplies for the purposes of such business or from disposing of the goods, wares, or products of such business; or
- prevent any carrier from supplying, receiving, or delivering materials, products, or supplies to or from any employer.

Georgia law also prohibits any person or organization from assembling at or near any place where a labor dispute exists and by force, intimidation, violence, or threats of violence

attempt to prevent any person from engaging in any lawful vocation. It is also unlawful to promote, encourage, or aid any such assemblage.

Georgia law also forbids “mass picketing” that obstructs entrance into a place of employment or blocks public roads or other public conveyances.

Any violation of these prohibitions is a misdemeanor. Any aggrieved employer or individual may also sue for damages and an injunction, which may be enforced by contempt proceedings. A union is not liable unless it counseled, authorized, or ratified the unlawful act.

C. Right To Work Protections For Employees, O.C.G.A. § 34-6-6

Since Georgia is a “right to work” state, employees in Georgia cannot be required to join or pay dues to a union. You may deduct union dues from an employee’s wages only if that employee specifically makes such a request, which request cannot be irrevocable for more than one year. You may not negotiate any collective bargaining agreement that contradicts these “right to work” provisions. Any party who violates these provisions is guilty of a criminal misdemeanor and may be sued by any aggrieved individual for damages and an injunction.

VII. CONCLUSION

Georgia law, and the courts enforcing it, offer employers a more favorable climate than most states. Georgia has recognized the importance of economic development, and the state and its workers have benefited from the state’s employer-friendly environment. Nevertheless, as you can see from the various state and federal statutes and regulations discussed above, there are many legal potential pitfalls. Reducing legal risks will require an active effort by management that includes practical and legal personnel policies, training of supervisors and employees in those policies and legal requirements and, where warranted, consistent discipline for policy violations.

For more information contact any attorney in the Atlanta office of Fisher & Phillips LLP at 404.231.1400 or visit our website at www.laborlawyers.com.