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PRACTICE FOCUS: LABOR AND EMPLOYMENT

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### Consider a ‘Prevailing Party’ Clause in Employee Contracts

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THE GENERAL RULE in Georgia is that each party must pay its own legal fees incurred in litigation. Although Georgia has several statutory “loser pays” rules, the circumstances necessary to recover fees under these statutes are based on many factors, which may or may not be present in any given case. Based on the uncertainty of whether any of these statutes may apply when seeking to enforce an employment contract, consideration should be given to including a “prevailing party” clause in any employment contract. These clauses may better allocate



the financial risks of litigation, as well as potentially discourage employees and former

employees from pursuing meritless litigation. If drafted correctly, the clause will entitle

the prevailing party to recover its fees and expenses as a matter of right and without having to resort to any of the statutory frameworks for recovering fees and expenses in connection with successful litigation.

### Drafting the Provision

First, a prevailing party provision must be “express,” and it must specifically reference the right to recover “attorney fees.” In other words, the clause must be “clear, definite, explicit, plain, direct, unmistakable, not dubious or ambiguous,” as indicated in *Doss & Associates v. First American Title Ins. Co., Inc.*, 325 Ga. App. 448, 464, 754 S.E.2d 85, 98 (2013), citing “Black’s Law Dictionary.” A general provision requiring indemnification “for all loss, cost or damage” is insufficient to provide for the recovery of attorney fees because “one would have to infer that the phrase ‘loss, cost, or damage’ also includes attorney fees, because the indemnity agreement does not set forth the words ‘attorney fees.’”

Next, the provision should be written fairly broadly (although consideration should be given to

the potential that it could backfire if the employee prevails). In *Howell v. Phoenix Life Ins. Co.*, 2013 WL 12200650, (N.D.Ga. 2013), the court interpreted the following broad provision in the context of a purchase agreement:

“The prevailing party in [any judicial proceeding brought against any of the parties to this Agreement on any dispute arising out of this Agreement or any matter related hereto] shall be entitled to an award of its attorney’s fees ... and expenses incurred at the trial and appellate levels and in any proceeding in Bankruptcy Court.”

The court concluded that the defendant was entitled to an award of attorneys’ fees under the agreement, “given the very broad contractual language, including in its scope cases arising out of or related to the agreement ... it is clear that this dispute arose out of the purchase agreement or was related thereto, and Defendant was the prevailing party.”

In a case in which the authors’ firm was involved, the following is an example of a successfully invoked prevailing party clause that Fulton County Superior

Court Judge Todd Markle recently upheld and enforced:

“In the event that either Employee or the Company commences legal proceedings to enforce the terms of this Agreement, the non-prevailing party shall be required to pay to the prevailing party all documented out-of-pocket fees, costs and expenses (including attorneys’ fees) reasonably incurred by the prevailing party in connection with the enforcement of this Agreement.”

### Brazeal v. Newpoint Media Group, LLC

The *Brazeal* matter (Civil Action File No. 2013CV236750, February 15, 2018, Order on Motion for Clarification and for Fees) was appealed twice, and both times the Georgia Court of Appeals affirmed the trial court’s summary judgment rulings in favor of the employer. As a result, Judge Markle included in the award those fees incurred on appeal because the contractual language “contemplate[d] all reasonable fees.” The award of fees was in the hundreds of thousands of dollars and greatly exceeded the amount in dispute. Notably, an expert testified on

the reasonableness of the fees and the lack of duplication in effort.

Similarly, in *Benchmark Builders, Inc. v. Schultz*, 294 Ga. 12, 751 S.E.2d 45 (2013), the court upheld and enforced the following provision:

“If any action at law or in equity ... is brought to enforce or interpret the provisions of this agreement, the prevailing party shall be entitled to recover reasonable attorney’s fees from the other party, which fees may be set by the court in the trial or appeal of such action or may be enforced in a separate action brought for that purpose and which fees shall be in addition to any other relief which may be awarded.”

In *Benchmark*, the Georgia Supreme Court held that this contractual language gave rise to a separate and distinct claim for fees, without regard to whether any actual damages were awarded. The Supreme Court found that the defendants, who were clients of a homebuilder, were the prevailing party despite not obtaining any monetary relief, and instead because they “prevail[ed] by not having any relief imposed

against them,” and “prevailed on the merits of [the homebuilder’s breach of contract] claim” against them.

Third, as demonstrated by *Benchmark*, it may be unclear who the “prevailing party” is. Based on the potential for confusion regarding the meaning of the term “prevailing party,” consideration should be given to including a definition for the phrase. One definition could be “the party who recovers substantially all of the relief it seeks.” If a definition is omitted, however, the court will try to determine the parties’ intent, and may consider how the phrase has been construed in other contracts, as well as the pertinent body of law.

When drafting a contract, the employer should consider including a “prevailing party” clause. These clauses serve to better allocate the risks and costs associated with litigation, and potentially discourage frivolous and meritless suits. The clause should be express, relatively broad, keeping in mind that the employer may not prevail, and consideration should be given to including a definition for the term “prevailing party.”

If such clauses are used, it is even more important to either be reasonable and settle early, or use all necessary resources to maximize chances one becomes the prevailing party.



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