

# ASSEMBLY, No. 5261

## STATE OF NEW JERSEY 217th LEGISLATURE

INTRODUCED DECEMBER 4, 2017

**Sponsored by:**

**Assemblywoman ANNETTE QUIJANO**

**District 20 (Union)**

**SYNOPSIS**

Limits certain provisions in and enforceability of restrictive covenants.

**CURRENT VERSION OF TEXT**

As introduced.



1 AN ACT limiting certain provisions in restrictive covenants and  
2 supplementing Title 34 of the Revised Statutes.

3

4 **BE IT ENACTED** by the Senate and General Assembly of the State  
5 of New Jersey:

6

7 1. The Legislature finds and declares that:

8 a. Post-employment contracts and severance agreements that  
9 restrict or prohibit competition, also known as “restrictive  
10 covenants,” “covenants not to compete,” or “non-compete  
11 agreements,” impede the development of business in the State by  
12 driving skilled workers to other jurisdictions and by requiring  
13 businesses to solicit skilled workers from out-of-State.

14 b. These contracts and agreements discourage innovation and  
15 production, impose special hardships on employees and specialized  
16 professionals who are trained to perform specific jobs, and may  
17 constitute restraint of trade and commerce.

18 c. Limiting severance agreements will stimulate New Jersey’s  
19 economy by preserving and providing jobs and by providing  
20 opportunities for employees to establish new business ventures and  
21 new job opportunities in the State.

22

23 2. As used in this act:

24 “Employee” means an individual who works for hire, including  
25 an individual employed in a supervisory, managerial, or  
26 confidential position.

27 “Employer” means any person, corporation, partnership,  
28 individual proprietorship, joint venture, firm, company or other  
29 similar legal entity, employs one or more employees, and shall  
30 include the State and its instrumentalities and political subdivisions,  
31 public corporations, and charitable organizations.

32 “Fringe benefit” means any vacation leave, sick leave, medical  
33 insurance plan, disability insurance plan, life insurance plan,  
34 pension benefit plan, or any other benefit of economic value, to the  
35 extent that the leave, plan, or benefit is paid for in whole or in part  
36 by the employer.

37 “Good cause” means a reasonable basis related to an individual  
38 employee for termination of the employee’s employment in view of  
39 relevant factors and circumstances, which may include:

40 (1) the employee engaging in a pattern of improper or disorderly  
41 conduct;

42 (2) not working in an efficient manner, or working belatedly and  
43 negligently, or in violation of the standards of quality of the  
44 establishment;

45 (3) repeated violation of reasonable rules or policies established  
46 for the operation of the establishment, provided a written copy of  
47 the rules or policies has been provided to the employee, provided  
48 that any standards, rules or policies are consistently enforced and

1 not applied to a particular employee in a disparate manner without  
2 justification; or

3 (4) for serious misconduct which is directly related to the  
4 employment relationship and has a detrimental effect on the  
5 employer's business, and in which situation the employer cannot  
6 reasonably be expected to take any course other than to terminate  
7 the employment of the employee.

8 "Good cause" shall not include the failure of an employee to  
9 agree to a covenant or agreement under this act, if the period of  
10 employment has already commenced.

11 "Low-wage employee" means an employee whose average  
12 weekly earnings, calculated by dividing the employee's earnings  
13 during the period of 12 calendar months immediately preceding the  
14 date of termination of employment by 52, or the number of weeks  
15 that the employee was actually paid during the 52 week period, are  
16 less than the Statewide average weekly remuneration as determined  
17 pursuant to R.S.43:21-3(c)(3).

18 "Pay" means hourly wages or periodic salary, including tips,  
19 regularly paid and nondiscretionary commissions and bonuses, and  
20 regularly paid overtime. "Pay" shall not mean fringe benefits.

21 "Restrictive covenant" means an agreement between an  
22 employer and an employee arising out of an existing or anticipated  
23 employment relationship, or an agreement between an employer and  
24 an employee with respect to severance pay, under which the  
25 employee or expected employee agrees not to engage in certain  
26 specified activities competitive with the employee's employer after  
27 the employment relationship has ended.

28 "Trade secrets" has the meaning given in section 2 of the "New  
29 Jersey Trade Secrets Act," P.L.2011, c.161 (C.56:15-2).

30

31 3. a. An employer may require or request that an employee  
32 enter into a restrictive covenant as a condition of employment or  
33 with respect to severance pay as provided in this act. A restrictive  
34 covenant is enforceable to the extent that it meets the following  
35 requirements:

36 (1) If the agreement is entered into in connection with the  
37 commencement of employment, the employer shall disclose the  
38 terms of the agreement in writing to the prospective employee by  
39 the earlier of a formal offer of employment, or 30 business days  
40 before the commencement of the employee's employment or, if the  
41 agreement is entered into after commencement of employment, the  
42 employer must provide the agreement at least 30 business days  
43 before the agreement is to be effective. The agreement shall be  
44 signed by the employer and the employee and expressly state that  
45 the employee has the right to consult with counsel prior to signing.

46 (2) The agreement shall not be broader than necessary to protect  
47 the legitimate business interests of the employer, including the  
48 employer's trade secrets or other confidential information that

1 would not otherwise qualify as a trade secret, including sales  
2 information, business strategies and plans, customer information,  
3 and price information. An agreement may be presumed necessary  
4 where the legitimate business interest cannot be adequately  
5 protected through an alternative agreement, including but not  
6 limited to: an agreement not to solicit or hire employees of the  
7 employer; an agreement not to solicit or transact business with  
8 customers, clients, referral sources, or vendors of the employer; or a  
9 nondisclosure or confidentiality agreement.

10 (3) The agreement may restrict the employee's engaging in  
11 activities competitive with the employee's former employer for a  
12 period not to exceed 12 months following the date of termination of  
13 employment.

14 (4) The agreement shall be reasonable in geographical reach and  
15 limited to the geographic areas in which the employee provided  
16 services or had a material presence or influence during the two  
17 years preceding the date of termination of employment, and shall  
18 not prohibit an employee from seeking employment in other states.

19 (5) The agreement shall be reasonable in the scope of proscribed  
20 activities in relation to the interests protected and limited to only  
21 the specific types of services provided by the employee at any time  
22 during the last two years of employment.

23 (6) The agreement shall not penalize an employee for defending  
24 against or challenging the validity or enforceability of the covenant.

25 (7) The agreement shall not contain a choice of law provision  
26 that would have the effect of avoiding the requirements of this  
27 section, if the employee is a resident of or employed in the State at  
28 the time of termination of employment and has been for at least 30  
29 days immediately preceding the employee's termination of  
30 employment.

31 (8) The agreement shall not waive an employee's substantive,  
32 procedural and remedial rights provided under this act, any other  
33 act or administrative regulation, or under the common law.

34 (9) The agreement shall not restrict an employee from providing  
35 a service to a customer or client of the employer, if the employee  
36 does not initiate or solicit the customer or client.

37 (10) The agreement shall not be unduly burdensome on the  
38 employee, injurious to the public, or inconsistent with public policy.

39 b. An agreement made under this act shall not be enforceable  
40 against:

41 (1) an employee who is classified as nonexempt under the  
42 federal "Fair Labor Standards Act of 1938" (29 U.S.C. s.201 et  
43 seq.);

44 (2) an undergraduate or graduate student that undertakes an  
45 internship or otherwise enters into a short-term employment  
46 relationship with an employer, whether paid or unpaid, while  
47 enrolled in a full-time or part-time undergraduate or graduate  
48 educational institution;

1 (3) an apprentice participating in an apprenticeship program  
2 registered by the Office of Apprenticeship of the U.S. Department  
3 of Labor and meeting the standards established by the office, or  
4 registered by a State apprenticeship agency recognized by the  
5 office;

6 (4) a seasonal or temporary employee;

7 (5) an employee that has been terminated without good cause or  
8 laid off by action of the employer;

9 (6) an independent contractor;

10 (7) an employee under the age of 18;

11 (8) a low-wage employee; or

12 (9) an employee whose period of service to an employer is less  
13 than one year.

14 c. Not later than 10 days after the termination of an  
15 employment relationship, the employer shall notify the employee in  
16 writing of the employer's intent to enforce the agreement. If the  
17 employer fails to provide that notice, the agreement shall be void.  
18 This subsection shall not apply if the employee has been terminated  
19 for good cause.

20 d. During any period after the employment relationship has  
21 ended and a covenant under this section is effective, the employer  
22 shall pay the employee an amount equal to 100 percent of the pay  
23 which the employee would have been entitled for work that would  
24 have been performed during the period prescribed under this  
25 section, and continues to make whatever benefit contributions  
26 would be required in order to maintain the fringe benefits to which  
27 the employee would have been entitled for work that would have  
28 been performed during the period prescribed under this section. A  
29 covenant shall not permit an employer to unilaterally discontinue or  
30 otherwise fail or refuse to make the payments except in the event of  
31 a breach by the employee. This subsection shall not apply if the  
32 employee has been terminated for good cause.

33 e. Any provision of an agreement established under this section  
34 shall be, to the extent it conflicts with this section, void and  
35 unenforceable.

36

37 4. a. An employee subject to a restrictive covenant under this  
38 act may bring a civil action in a court of competent jurisdiction  
39 against any employer or person alleged to have violated this act.  
40 An employee shall bring any action under this act within two years  
41 of the later of:

42 (1) when a prohibited agreement was signed;

43 (2) when the employee learns of the prohibited agreement;

44 (3) when the employment relationship is terminated; or

45 (4) when the employer takes any step to enforce the agreement.

46 The court shall have jurisdiction to void any agreement and to order  
47 all appropriate relief, including: enjoining the conduct of any person  
48 or employer; ordering payment of liquidated damages; and

1 awarding lost compensation, damages, reasonable attorneys' fees  
2 and costs.

3 b. For the purposes of this section, liquidated damages shall be  
4 calculated as an amount not more than \$10,000.

5  
6 5. Every employer shall post a copy of this act or a summary  
7 approved by the Department of Labor and Workforce Development  
8 in a prominent place in the work area. An employer who fails to  
9 post a copy of this act or a summary of this act shall be issued by  
10 the department a written warning for the first violation, and shall be  
11 fined up to \$250 for a second violation and up to \$1,000 for the  
12 third and each subsequent violation. A penalty imposed by the  
13 department pursuant to this section shall be collected and enforced  
14 by summary proceedings pursuant to the provisions of the "Penalty  
15 Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).

16  
17 6. This act shall take effect immediately, but shall not apply to  
18 any agreement in effect on or before the date of enactment.

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#### STATEMENT

22

23 This bill places certain limitations on restrictive covenants  
24 between employers and employees. Restrictive covenants are  
25 agreements between employers and employees or anticipated  
26 employees under which the employee or anticipated employee  
27 agrees not to engage in certain specified activities competitive with  
28 the employer after the employment relationship has ended.  
29 Employees are often required to enter into restrictive covenants as a  
30 condition of employment, or as a condition of receiving severance  
31 pay.

32 Under the bill, an employer may require or request that an  
33 employee enter into a restrictive covenant as a condition of  
34 employment or with respect to severance pay. A restrictive  
35 covenant is enforceable to the extent that it meets the following  
36 requirements:

37 (1) If the agreement is entered into in connection with the  
38 commencement of employment, the employer must disclose the  
39 terms of the agreement in writing to the prospective employee. The  
40 agreement must be signed by the employer and the employee and  
41 expressly state that the employee has the right to consult with  
42 counsel prior to signing.

43 (2) The agreement may not be broader than necessary to protect  
44 the legitimate business interests of the employer, including the  
45 employer's trade secrets or other confidential information that  
46 would not otherwise qualify as a trade secret.

47 (3) The agreement may restrict the employee's engaging in  
48 activities competitive with the employee's former employer for a

1 period not to exceed 12 months following the date of termination of  
2 employment.

3 (4) The agreement must be reasonable in geographical reach and  
4 limited to the geographic areas in which the employee provided  
5 services or had a material presence or influence during the two  
6 years preceding the date of termination of employment, and may  
7 not prohibit an employee from seeking employment in other states.

8 (5) The agreement must be reasonable in the scope of proscribed  
9 activities in relation to the interests protected and limited to only  
10 the specific types of services provided by the employee at any time  
11 during the last two years of employment.

12 (6) The agreement must not penalize an employee for defending  
13 against or challenging the validity or enforceability of the covenant.

14 (7) The agreement must not contain a choice of law provision  
15 that would have the effect of avoiding the requirements of the bill,  
16 if the employee is a resident of or employed in the State at the time  
17 of termination of employment and has been for at least 30 days  
18 immediately preceding the employee's termination of employment.

19 (8) The agreement must not waive an employee's substantive,  
20 procedural and remedial rights provided under the bill, any other act  
21 or administrative regulation, or under the common law.

22 (9) The agreement must not restrict an employee from providing  
23 a service to a customer or client of the employer, if the employee  
24 does not initiate or solicit the customer or client.

25 (10) The agreement may not be unduly burdensome on the  
26 employee, injurious to the public, or inconsistent with public policy.

27 The bill also provides that restrictive covenants are not  
28 enforceable against:

29 (1) an employee who is classified as nonexempt under the  
30 federal "Fair Labor Standards Act of 1938" (29 U.S.C. s.201 et  
31 seq.);

32 (2) an undergraduate or graduate student that undertakes an  
33 internship or otherwise enters into a short-term employment  
34 relationship with an employer, whether paid or unpaid, while  
35 enrolled in a full-time or part-time undergraduate or graduate  
36 educational institution;

37 (3) an apprentice participating in an apprenticeship program  
38 registered by the Office of Apprenticeship of the U.S. Department  
39 of Labor and meeting the standards established by the office, or  
40 registered by a State apprenticeship agency recognized by the  
41 office;

42 (4) a seasonal or temporary employee;

43 (5) an employee that has been terminated without good cause or  
44 laid off by action of the employer;

45 (6) an independent contractor;

46 (7) an employee under the age of 18;

47 (8) a low-wage employee; or

1 (9) an employee whose period of service to an employer is less  
2 than one year.

3 The bill provides that, not later than 10 days after the termination  
4 of an employment relationship, the employer must notify the  
5 employee in writing of the employer's intent to enforce the  
6 agreement. If the employer fails to provide notice, the agreement is  
7 void. This requirement does not apply if the employee has been  
8 terminated for good cause.

9 During any period after the employment relationship has ended  
10 and a covenant is effective, the employer must pay the employee an  
11 amount equal to 100 percent of the pay which the employee would  
12 have been entitled for work that would have been performed during  
13 the period, and continue to make whatever benefit contributions  
14 would be required in order to maintain the fringe benefits to which  
15 the employee would have been entitled for work that would have  
16 been performed. A covenant does not permit an employer to  
17 unilaterally discontinue or otherwise fail or refuse to make the  
18 payments except in the event of a breach by the employee. These  
19 requirements do not apply if the employee has been terminated for  
20 good cause.

21 An employee subject to a restrictive covenant may bring a civil  
22 action in a court of competent jurisdiction against any employer or  
23 person alleged to have violated the bill. An employee must bring  
24 the action within two years of the later of:

- 25 (1) when a prohibited agreement was signed;
- 26 (2) when the employee learns of the prohibited agreement;
- 27 (3) when the employment relationship is terminated; or
- 28 (4) when the employer takes any step to enforce the agreement.

29 The court has jurisdiction to void any agreement and to order  
30 appropriate relief.

31 The bill also requires employers to post a copy of the bill or a  
32 summary of its requirements in a prominent place in the work area.