

ASSEMBLY, No. 1769

STATE OF NEW JERSEY
218th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2018 SESSION

Sponsored by:

Assemblywoman ANNETTE QUIJANO

District 20 (Union)

SYNOPSIS

Limits certain provisions in and enforceability of restrictive covenants.

CURRENT VERSION OF TEXT

Introduced Pending Technical Review by Legislative Counsel.



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.).

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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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21 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.