

SENATE, No. 2872

STATE OF NEW JERSEY
218th LEGISLATURE

INTRODUCED AUGUST 27, 2018

Sponsored by:
Senator JOSEPH P. CRYAN
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 “Low-wage employee” means an employee whose average
38 weekly earnings, calculated by dividing the employee’s earnings
39 during the period of 12 calendar months immediately preceding the
40 date of termination of employment by 52, or the number of weeks
41 that the employee was actually paid during the 52 week period, are
42 less than the Statewide average weekly remuneration as determined
43 pursuant to paragraph (3) of subsection (c) of paragraph (3) of
44 subsection (C) of R.S.43:21-3.

45 “Misconduct” means conduct which is improper, intentional,
46 connected with the individual’s work, within the individual’s
47 control, not a good faith error of judgment or discretion, and is
48 either a deliberate refusal, without good cause, to comply with the

1 employer's lawful and reasonable rules made known to the
2 employee or a deliberate disregard of standards of behavior the
3 employer has a reasonable right to expect, including reasonable
4 safety standards and reasonable standards for a workplace free of
5 drug and substance abuse.

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

9 "Restrictive covenant" means an agreement between an
10 employer and an employee arising out of an existing or anticipated
11 employment relationship, or an agreement between an employer and
12 an employee with respect to severance pay, under which the
13 employee or expected employee agrees not to engage in certain
14 specified activities competitive with the employee's employer after
15 the employment relationship has ended.

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

18

19 3. a. An employer may require or request that an employee
20 enter into a restrictive covenant as a condition of employment or
21 with respect to severance pay as provided in this act. A restrictive
22 covenant is enforceable to the extent that it meets the following
23 requirements:

24 (1) If the agreement is entered into in connection with the
25 commencement of employment, the employer shall disclose the
26 terms of the agreement in writing to the prospective employee by
27 the earlier of a formal offer of employment, or 30 business days
28 before the commencement of the employee's employment or, if the
29 agreement is entered into after commencement of employment, the
30 employer must provide the agreement at least 30 business days
31 before the agreement is to be effective. The agreement shall be
32 signed by the employer and the employee and expressly state that
33 the employee has the right to consult with counsel prior to signing.

34 (2) The agreement shall not be broader than necessary to protect
35 the legitimate business interests of the employer, including the
36 employer's trade secrets or other confidential information that
37 would not otherwise qualify as a trade secret, including sales
38 information, business strategies and plans, customer information,
39 and price information. An agreement may be presumed necessary
40 where the legitimate business interest cannot be adequately
41 protected through an alternative agreement, including but not
42 limited to: an agreement not to solicit or hire employees of the
43 employer; an agreement not to solicit or transact business with
44 customers, clients, referral sources, or vendors of the employer; or a
45 nondisclosure or confidentiality agreement.

46 (3) The agreement may restrict the employee's engaging in
47 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 shall 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 shall
7 not prohibit an employee from seeking employment in other states.

8 (5) The agreement shall 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 shall not penalize an employee for defending
13 against or challenging the validity or enforceability of the covenant.

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

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

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

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

28 b. An agreement made under this act shall not be enforceable
29 against:

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

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

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

43 (4) a seasonal or temporary employee;

44 (5) an employee who has been terminated without a
45 determination of misconduct or laid off by action of the employer;

46 (6) an independent contractor;

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

48 (8) a low-wage employee; or

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

3 c. Not later than 10 days after the termination of an
4 employment relationship, the employer shall notify the employee in
5 writing of the employer's intent to enforce the agreement. If the
6 employer fails to provide that notice, the agreement shall be void.
7 This subsection shall not apply if the employee has been terminated
8 for misconduct.

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

22 e. Any provision of an agreement established under this section
23 shall be, to the extent it conflicts with this section, void and
24 unenforceable.

25

26 4. a. An employee subject to a restrictive covenant under this
27 act may bring a civil action in a court of competent jurisdiction
28 against any employer or person alleged to have violated this act.
29 An employee shall bring any action under this act within two years
30 of the later of:

- 31 (1) when a prohibited agreement was signed;
32 (2) when the employee learns of the prohibited agreement;
33 (3) when the employment relationship is terminated; or
34 (4) when the employer takes any step to enforce the agreement.

35 The court shall have jurisdiction to void any agreement and to order
36 all appropriate relief, including: enjoining the conduct of any person
37 or employer; ordering payment of liquidated damages; and
38 awarding lost compensation, damages, reasonable attorneys' fees
39 and costs.

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

42

43 5. Every employer shall post a copy of this act or a summary
44 approved by the Department of Labor and Workforce Development
45 in a prominent place in the work area. An employer who fails to
46 post a copy of this act or a summary of this act shall be issued by
47 the department a written warning for the first violation, and shall be
48 fined up to \$250 for a second violation and up to \$1,000 for the

1 third and each subsequent violation. A penalty imposed by the
2 department pursuant to this section shall be collected and enforced
3 by summary proceedings pursuant to the provisions of the "Penalty
4 Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).
5

6 6. This act shall take effect immediately, but shall not apply to
7 any agreement in effect on or before the date of enactment.
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10 STATEMENT
11

12 This bill places certain limitations on restrictive covenants
13 between employers and employees. Restrictive covenants are
14 agreements between employers and employees or anticipated
15 employees under which the employee or anticipated employee
16 agrees not to engage in certain specified activities competitive with
17 the employer after the employment relationship has ended.
18 Employees are often required to enter into restrictive covenants as a
19 condition of employment, or as a condition of receiving severance
20 pay.

21 Under the bill, an employer may require or request that an
22 employee enter into a restrictive covenant as a condition of
23 employment or with respect to severance pay. A restrictive
24 covenant is enforceable to the extent that it meets the following
25 requirements:

26 (1) If the agreement is entered into in connection with the
27 commencement of employment, the employer must disclose the
28 terms of the agreement in writing to the prospective employee. The
29 agreement must be signed by the employer and the employee and
30 expressly state that the employee has the right to consult with
31 counsel prior to signing.

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

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

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

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

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

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

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

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

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

16 The bill also provides that restrictive covenants are not
17 enforceable against:

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

21 (2) an undergraduate or graduate student that undertakes an
22 internship or otherwise enters into a short-term employment
23 relationship with an employer, whether paid or unpaid, while
24 enrolled in a full-time or part-time undergraduate or graduate
25 educational institution;

26 (3) an apprentice participating in an apprenticeship program
27 registered by the Office of Apprenticeship of the U.S. Department
28 of Labor and meeting the standards established by the office, or
29 registered by a State apprenticeship agency recognized by the
30 office;

31 (4) a seasonal or temporary employee;

32 (5) an employee that has been terminated without a
33 determination of misconduct or laid off by action of the employer;

34 (6) an independent contractor;

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

36 (8) a low-wage employee; or

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

39 The bill provides that, not later than 10 days after the termination
40 of an employment relationship, the employer must notify the
41 employee in writing of the employer's intent to enforce the
42 agreement. If the employer fails to provide notice, the agreement is
43 void. This requirement does not apply if the employee has been
44 terminated for misconduct.

45 During any period after the employment relationship has ended
46 and a covenant is effective, the employer must pay the employee an
47 amount equal to 100 percent of the pay which the employee would
48 have been entitled for work that would have been performed during

1 the period, and continue to make whatever benefit contributions
2 would be required in order to maintain the fringe benefits to which
3 the employee would have been entitled for work that would have
4 been performed. A covenant does not permit an employer to
5 unilaterally discontinue or otherwise fail or refuse to make the
6 payments except in the event of a breach by the employee. These
7 requirements do not apply if the employee has been terminated for
8 misconduct.

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

- 13 (1) when a prohibited agreement was signed;
- 14 (2) when the employee learns of the prohibited agreement;
- 15 (3) when the employment relationship is terminated; or
- 16 (4) when the employer takes any step to enforce the agreement.

17 The court has jurisdiction to void any agreement and to order
18 appropriate relief.

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