ASSEMBLY, No. 3715

STATE OF NEW JERSEY

220th LEGISLATURE

INTRODUCED MAY 2, 2022

Sponsored by:
Assemblyman PAUL D. MORIARTY
District 4 (Camden and Gloucester)

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District 35 (Bergen and Passaic)

Co-Sponsored by:
Assemblywoman Quijano, Assemblymen Sampson, Spearman and Assemblywoman Jaffer

SYNOPSIS
Limits certain provisions in restrictive covenants and limits enforceability of restrictive covenants.

CURRENT VERSION OF TEXT
As introduced.

(Sponsorship Updated As Of: 9/15/2022)
AN ACT limiting certain provisions in restrictive covenants and supplemeng Title 34 of the Revised Statutes.

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

1. The Legislature finds and declares that:
   a. Post-employment contracts and severance agreements that restrict or prohibit competition, also known as “restrictive covenants,” “covenants not to compete,” “no-poach agreements,” or “non-compete agreements,” impede the development of business in the State by driving skilled workers to other jurisdictions and by requiring businesses to solicit skilled workers from out-of-State.
   b. These contracts and agreements discourage innovation and production, impose special hardships on employees and specialized professionals who are trained to perform specific jobs, and may constitute restraint of trade and commerce.
   c. Limiting severance agreements will stimulate New Jersey’s economy by preserving and providing jobs and by providing opportunities for employees to establish new business ventures and new job opportunities in the State.

2. As used in this act:
   “Employee” means an individual who works for hire, including an individual employed in a supervisory, managerial, or confidential position.
   “Employer” means any person, corporation, partnership, individual proprietorship, joint venture, firm, company or other similar legal entity, employs one or more employees, and shall include the State and its instrumentalities and political subdivisions, public corporations, and charitable organizations.
   “Fringe benefit” means any vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, pension benefit plan, or any other benefit of economic value, to the extent that the leave, plan, or benefit is paid for in whole or in part by the employer.
   “Low-wage employee” means an employee whose average weekly earnings, calculated by dividing the employee’s earnings during the period of 12 calendar months immediately preceding the date of termination of employment by 52, or the number of weeks that the employee was actually paid during the 52 week period, are less than the Statewide average weekly remuneration as determined pursuant to paragraph (3) of subsection (c) of paragraph (3) of R.S.43:21-3.
   “Misconduct” means conduct which is improper, intentional, connected with the individual’s work, within the individual’s control, not a good faith error of judgment or discretion, and is either a deliberate refusal, without good cause, to comply with the
employer’s lawful and reasonable rules made known to the
employee or a deliberate disregard of standards of behavior the
employer has a reasonable right to expect, including reasonable
safety standards and reasonable standards for a workplace free of
drug and substance abuse.

“No-poach agreement” means any agreement between employers
or between an employer acting as a contractor and any legal person
acting as a contractee that restricts or hinders the ability of an
employer to contract for the services of a low-wage employee.

“Pay” means hourly wages or periodic salary, including tips,
regularly paid and nondiscretionary commissions and bonuses, and
regularly paid overtime. “Pay” shall not mean fringe benefits.

“Restrictive covenant” means an agreement between an
employer and an employee arising out of an existing or anticipated
employment relationship, or an agreement between an employer and
an employee with respect to severance pay, under which the
employee or expected employee agrees not to engage in certain
specified activities competitive with the employee’s employer after
the employment relationship has ended.

“Trade secrets” has the meaning given in section 2 of the “New

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) a seasonal or temporary employee;
an employee who has been terminated without a
determination of misconduct or laid off by action of the employer;
(6) an independent contractor;
(7) an employee under the age of 18;
(8) a low-wage employee; or
(9) an employee whose period of service to an employer is less
than one year.
c. Not later than 10 days after the termination of an
employment relationship, the employer shall notify the employee in
writing of the employer’s intent to enforce the agreement. If the
employer fails to provide that notice, the agreement shall be void.
This subsection shall not apply if the employee has been terminated
for misconduct.
d. During any period after the employment relationship has
ended and a covenant under this section is effective, the employer
shall pay the employee an amount equal to 100 percent of the pay
which the employee would have been entitled for work that would
have been performed during the period prescribed under this
section, and continues to make whatever benefit contributions
would be required in order to maintain the fringe benefits to which
the employee would have been entitled for work that would have
been performed during the period prescribed under this section. A
covenant shall not permit an employer to unilaterally discontinue or
otherwise fail or refuse to make the payments except in the event of
a breach by the employee. This subsection shall not apply if the
employee has been terminated for misconduct.
e. Any provision of an agreement established under this section
shall be, to the extent it conflicts with this section, void and
unenforceable.

4. a. No-poach agreements are hereby declared to be contrary
to public policy and any no-poach agreement shall be void.
b. An employee subject to a restrictive covenant or covered by
a no-poach agreement under this act may bring a civil action in a
court of competent jurisdiction against any employer or person
alleged to have violated this act. An employee shall bring any
action under this act within two years of the later of:
(1) when a prohibited agreement was signed;
(2) when the employee learns of the prohibited agreement;
(3) when the employment relationship is terminated; or
(4) when the employer takes any step to enforce the agreement.
The court shall have jurisdiction to void any agreement and to order
all appropriate relief, including: enjoining the conduct of any person
or employer; ordering payment of liquidated damages; and
awarding lost compensation, damages, reasonable attorneys’ fees
and costs.
c. For the purposes of this section, liquidated damages shall be
calculated as an amount not more than $10,000.
5. Every employer shall post a copy of this act or a summary approved by the Department of Labor and Workforce Development in a prominent place in the work area. An employer who fails to post a copy of this act or a summary of this act shall be issued by the department a written warning for the first violation, and shall be fined up to $250 for a second violation and up to $1,000 for the third and each subsequent violation. A penalty imposed by the department pursuant to this section shall be collected and enforced by summary proceedings pursuant to the provisions of the “Penalty Enforcement Law of 1999,” P.L.1999, c.274 (C.2A:58-10 et seq.).

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

STATEMENT

This bill places certain limitations on restrictive covenants between employers, employees and no-poach agreements between employers. Restrictive covenants are agreements between employers and employees or anticipated employees under which the employee or anticipated employee agrees not to engage in certain specified activities competitive with the employer after the employment relationship has ended. Employees are often required to enter into restrictive covenants as a condition of employment, or as a condition of receiving severance pay.

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

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

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

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

(4) The agreement must be reasonable in geographical reach and limited to the geographic areas in which the employee provided services or had a material presence or influence during the two
years preceding the date of termination of employment, and may
not prohibit an employee from seeking employment in other states.
(5) The agreement must be reasonable in the scope of proscribed
activities in relation to the interests protected and limited to only
the specific types of services provided by the employee at any time
during the last two years of employment.
(6) The agreement must not penalize an employee for defending
against or challenging the validity or enforceability of the covenant.
(7) The agreement must not contain a choice of law provision
that would have the effect of avoiding the requirements of the bill,
if the employee is a resident of or employed in the State at the time
of termination of employment and has been for at least 30 days
immediately preceding the employee’s termination of employment.
(8) The agreement must not waive an employee’s substantive,
procedural and remedial rights provided under the bill, any other act
or administrative regulation, or under the common law.
(9) The agreement must not restrict an employee from providing
a service to a customer or client of the employer, if the employee
does not initiate or solicit the customer or client.
(10) The agreement may not be unduly burdensome on the
employee, injurious to the public, or inconsistent with public policy.
The bill also provides that restrictive covenants are not
enforceable against:
(1) an employee who is classified as nonexempt under the
federal “Fair Labor Standards Act of 1938” (29 U.S.C. s.201 et seq.);
(2) an undergraduate or graduate student that undertakes an
internship or otherwise enters into a short-term employment
relationship with an employer, whether paid or unpaid, while
enrolled in a full-time or part-time undergraduate or graduate
educational institution;
(3) an apprentice participating in an apprenticeship program
registered by the Office of Apprenticeship of the U.S. Department
of Labor and meeting the standards established by the office, or
registered by a State apprenticeship agency recognized by the
office;
(4) a seasonal or temporary employee;
(5) an employee that has been terminated without a
determination of misconduct or laid off by action of the employer;
(6) an independent contractor;
(7) an employee under the age of 18;
(8) a low-wage employee; or
(9) an employee whose period of service to an employer is less
than one year.
The bill provides that, not later than 10 days after the termination
of an employment relationship, the employer must notify the
employee in writing of the employer’s intent to enforce the
agreement. If the employer fails to provide notice, the agreement is
void. This requirement does not apply if the employee has been terminated for misconduct.

No-poach agreements are agreements that restrict the ability of employers to hire employees. This bill declares all no-poach agreements covering low-wage employees to be contrary to public policy and void.

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

An employee subject to a restrictive covenant or covered by a no-poach agreement may bring a civil action in a court of competent jurisdiction against any employer or person alleged to have violated the bill. An employee must bring the action within two years of the later of:

1. when a prohibited agreement was signed;
2. when the employee learns of the prohibited agreement;
3. when the employment relationship is terminated; or
4. when the employer takes any step to enforce the agreement.

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

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