

SENATE, No. 1410

STATE OF NEW JERSEY

220th LEGISLATURE

INTRODUCED FEBRUARY 10, 2022

Sponsored by:

Senator JOSEPH P. CRYAN

District 20 (Union)

Co-Sponsored by:

Senators Johnson and Stack

SYNOPSIS

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

CURRENT VERSION OF TEXT

As introduced.



(Sponsorship Updated As Of: 9/29/2022)

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,” “no-poach agreements,” or
11 “non-compete agreements,” impede the development of business in
12 the State by driving skilled workers to other jurisdictions and by
13 requiring 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 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 "No-poach agreement" means any agreement between employers
7 or between an employer acting as a contractor and any legal person
8 acting as a contractee that restricts or hinders the ability of an
9 employer to contract for the services of a low-wage employee.

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

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

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

22

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

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

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

1 customers, clients, referral sources, or vendors of the employer; or a
2 nondisclosure or confidentiality agreement.

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

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

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

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

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

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

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

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

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

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

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

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

47 (4) a seasonal or temporary employee;

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

3 (6) an independent contractor;

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

5 (8) a low-wage employee; or

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

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

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

27 e. Any provision of an agreement established under this section
28 shall be, to the extent it conflicts with this section, void and
29 unenforceable.

30

31 4. a. No-poach agreements are hereby declared to be contrary
32 to public policy and any no-poach agreement shall be void.

33 b. An employee subject to a restrictive covenant or covered by
34 a no-poach agreement under this act may bring a civil action in a
35 court of competent jurisdiction against any employer or person
36 alleged to have violated this act. An employee shall bring any
37 action under this act within two years of the later of:

38 (1) when a prohibited agreement was signed;

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

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

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

42 The court shall have jurisdiction to void any agreement and to order
43 all appropriate relief, including: enjoining the conduct of any person
44 or employer; ordering payment of liquidated damages; and
45 awarding lost compensation, damages, reasonable attorneys' fees
46 and costs.

47 c. For the purposes of this section, liquidated damages shall be
48 calculated as an amount not more than \$10,000.

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

12 6. This act shall take effect immediately, but shall not apply to
13 any agreement in effect on or before the date of enactment.
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15

16 **STATEMENT**
17

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

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

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

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

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

46 (4) The agreement must be reasonable in geographical reach and
47 limited to the geographic areas in which the employee provided
48 services or had a material presence or influence during the two

1 years preceding the date of termination of employment, and may
2 not prohibit an employee from seeking employment in other states.

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

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

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

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

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

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

22 The bill also provides that restrictive covenants are not
23 enforceable against:

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

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

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

37 (4) a seasonal or temporary employee;

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

40 (6) an independent contractor;

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

42 (8) a low-wage employee; or

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

45 The bill provides that, not later than 10 days after the termination
46 of an employment relationship, the employer must notify the
47 employee in writing of the employer's intent to enforce the
48 agreement. If the employer fails to provide notice, the agreement is

1 void. This requirement does not apply if the employee has been
2 terminated for misconduct.

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

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

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

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

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

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