

[First Reprint]

**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**

As reported by the Assembly Labor Committee on May 10, 2018, with amendments.



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 <sup>1</sup>“Good cause” means a reasonable basis related to an  
38 individual employee for termination of the employee’s employment  
39 in view of 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;

**EXPLANATION** – Matter enclosed in bold-faced brackets **[thus]** in the above bill is  
not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

<sup>1</sup>Assembly ALA committee amendments adopted May 10, 2018.

1 (3) repeated violation of reasonable rules or policies established  
2 for the operation of the establishment, provided a written copy of  
3 the rules or policies has been provided to the employee, provided  
4 that any standards, rules or policies are consistently enforced and  
5 not applied to a particular employee in a disparate manner without  
6 justification; or

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

12 "Good cause" shall not include the failure of an employee to  
13 agree to a covenant or agreement under this act, if the period of  
14 employment has already commenced.】<sup>1</sup>

15 "Low-wage employee" means an employee whose average  
16 weekly earnings, calculated by dividing the employee's earnings  
17 during the period of 12 calendar months immediately preceding the  
18 date of termination of employment by 52, or the number of weeks  
19 that the employee was actually paid during the 52 week period, are  
20 less than the Statewide average weekly remuneration as determined  
21 pursuant to <sup>1</sup>**【R.S.43:21-3(c)(3)】** paragraph (3) of subsection (c) of  
22 <sup>1</sup>**【R.S.43:21-3】** paragraph (3) of subsection (C) of R.S.43:21-3<sup>1</sup>.

23 <sup>1</sup>"Misconduct" means conduct which is improper, intentional,  
24 connected with the individual's work, within the individual's  
25 control, not a good faith error of judgment or discretion, and is  
26 either a deliberate refusal, without good cause, to comply with the  
27 employer's lawful and reasonable rules made known to the  
28 employee or a deliberate disregard of standards of behavior the  
29 employer has a reasonable right to expect, including reasonable  
30 safety standards and reasonable standards for a workplace free of  
31 drug and substance abuse.<sup>1</sup>

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

35 "Restrictive covenant" means an agreement between an  
36 employer and an employee arising out of an existing or anticipated  
37 employment relationship, or an agreement between an employer and  
38 an employee with respect to severance pay, under which the  
39 employee or expected employee agrees not to engage in certain  
40 specified activities competitive with the employee's employer after  
41 the employment relationship has ended.

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

44  
45 3. a. An employer may require or request that an employee  
46 enter into a restrictive covenant as a condition of employment or  
47 with respect to severance pay as provided in this act. A restrictive

1 covenant is enforceable to the extent that it meets the following  
2 requirements:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 (4) a seasonal or temporary employee;

22 (5) an employee <sup>1</sup>**[that]** who<sup>1</sup> has been terminated without  
23 <sup>1</sup>**[good cause]** a determination of misconduct<sup>1</sup> or laid off by action  
24 of the employer;

25 (6) an independent contractor;

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

27 (8) a low-wage employee; or

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

30 c. Not later than 10 days after the termination of an  
31 employment relationship, the employer shall notify the employee in  
32 writing of the employer's intent to enforce the agreement. If the  
33 employer fails to provide that notice, the agreement shall be void.  
34 This subsection shall not apply if the employee has been terminated  
35 for <sup>1</sup>**[good cause]** misconduct<sup>1</sup>.

36 d. During any period after the employment relationship has  
37 ended and a covenant under this section is effective, the employer  
38 shall pay the employee an amount equal to 100 percent of the pay  
39 which the employee would have been entitled for work that would  
40 have been performed during the period prescribed under this  
41 section, and continues to make whatever benefit contributions  
42 would be required in order to maintain the fringe benefits to which  
43 the employee would have been entitled for work that would have  
44 been performed during the period prescribed under this section. A  
45 covenant shall not permit an employer to unilaterally discontinue or  
46 otherwise fail or refuse to make the payments except in the event of  
47 a breach by the employee. This subsection shall not apply if the  
48 employee has been terminated for <sup>1</sup>**[good cause]** misconduct<sup>1</sup>.

1 e. Any provision of an agreement established under this section  
2 shall be, to the extent it conflicts with this section, void and  
3 unenforceable.

4  
5 4. a. An employee subject to a restrictive covenant under this  
6 act may bring a civil action in a court of competent jurisdiction  
7 against any employer or person alleged to have violated this act.  
8 An employee shall bring any action under this act within two years  
9 of the later of:

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

14 The court shall have jurisdiction to void any agreement and to order  
15 all appropriate relief, including: enjoining the conduct of any person  
16 or employer; ordering payment of liquidated damages; and  
17 awarding lost compensation, damages, reasonable attorneys' fees  
18 and costs.

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

21  
22 5. Every employer shall post a copy of this act or a summary  
23 approved by the Department of Labor and Workforce Development  
24 in a prominent place in the work area. An employer who fails to  
25 post a copy of this act or a summary of this act shall be issued by  
26 the department a written warning for the first violation, and shall be  
27 fined up to \$250 for a second violation and up to \$1,000 for the  
28 third and each subsequent violation. A penalty imposed by the  
29 department pursuant to this section shall be collected and enforced  
30 by summary proceedings pursuant to the provisions of the "Penalty  
31 Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).

32  
33 6. This act shall take effect immediately, but shall not apply to  
34 any agreement in effect on or before the date of enactment.