

ASSEMBLY LABOR COMMITTEE

STATEMENT TO

ASSEMBLY, No. 1769

with committee amendments

STATE OF NEW JERSEY

DATED: MAY 10, 2018

The Assembly Labor Committee reports favorably and with committee amendments Assembly Bill No. 1769.

As amended, this bill places certain limitations on restrictive covenants between employers and employees. 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.

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 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.

This bill was pre-filed for introduction in the 2018-2019 session pending technical review. As reported, the bill includes the changes required by technical review, which has been performed.

COMMITTEE AMENDMENTS:

The committee amended the bill to remove the standard of “good cause” for termination and replace it with “misconduct.” Under the amendments, “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.