

**ASSEMBLY, No. 1650**

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**STATE OF NEW JERSEY**

**219th LEGISLATURE**

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PRE-FILED FOR INTRODUCTION IN THE 2020 SESSION

**Sponsored by:**

**Assemblywoman ANNETTE QUIJANO**

**District 20 (Union)**

**SYNOPSIS**

Limits certain provisions in and enforceability of restrictive covenants.

**CURRENT VERSION OF TEXT**

Introduced Pending Technical Review by Legislative Counsel.



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 R.S.43:21-3.

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

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

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

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

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

17

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

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

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

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

- 1       (4) The agreement shall be reasonable in geographical reach and  
2       limited to the geographic areas in which the employee provided  
3       services or had a material presence or influence during the two  
4       years preceding the date of termination of employment, and shall  
5       not prohibit an employee from seeking employment in other states.
- 6       (5) The agreement shall be reasonable in the scope of proscribed  
7       activities in relation to the interests protected and limited to only  
8       the specific types of services provided by the employee at any time  
9       during the last two years of employment.
- 10      (6) The agreement shall not penalize an employee for defending  
11      against or challenging the validity or enforceability of the covenant.
- 12      (7) The agreement shall not contain a choice of law provision  
13      that would have the effect of avoiding the requirements of this  
14      section, if the employee is a resident of or employed in the State at  
15      the time of termination of employment and has been for at least 30  
16      days immediately preceding the employee's termination of  
17      employment.
- 18      (8) The agreement shall not waive an employee's substantive,  
19      procedural and remedial rights provided under this act, any other  
20      act or administrative regulation, or under the common law.
- 21      (9) The agreement shall not restrict an employee from providing  
22      a service to a customer or client of the employer, if the employee  
23      does not initiate or solicit the customer or client.
- 24      (10) The agreement shall not be unduly burdensome on the  
25      employee, injurious to the public, or inconsistent with public policy.
- 26      b. An agreement made under this act shall not be enforceable  
27      against:
- 28      (1) an employee who is classified as nonexempt under the  
29      federal "Fair Labor Standards Act of 1938" (29 U.S.C. s.201 et  
30      seq.);
- 31      (2) an undergraduate or graduate student that undertakes an  
32      internship or otherwise enters into a short-term employment  
33      relationship with an employer, whether paid or unpaid, while  
34      enrolled in a full-time or part-time undergraduate or graduate  
35      educational institution;
- 36      (3) an apprentice participating in an apprenticeship program  
37      registered by the Office of Apprenticeship of the U.S. Department  
38      of Labor and meeting the standards established by the office, or  
39      registered by a State apprenticeship agency recognized by the  
40      office;
- 41      (4) a seasonal or temporary employee;
- 42      (5) an employee who has been terminated without a  
43      determination of misconduct or laid off by action of the employer;
- 44      (6) an independent contractor;
- 45      (7) an employee under the age of 18;
- 46      (8) a low-wage employee; or
- 47      (9) an employee whose period of service to an employer is less  
48      than one year.

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

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

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

23  
24 4. a. An employee subject to a restrictive covenant under this  
25 act may bring a civil action in a court of competent jurisdiction  
26 against any employer or person alleged to have violated this act.  
27 An employee shall bring any action under this act within two years  
28 of the later of:

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

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

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

40  
41 5. Every employer shall post a copy of this act or a summary  
42 approved by the Department of Labor and Workforce Development  
43 in a prominent place in the work area. An employer who fails to  
44 post a copy of this act or a summary of this act shall be issued by  
45 the department a written warning for the first violation, and shall be  
46 fined up to \$250 for a second violation and up to \$1,000 for the  
47 third and each subsequent violation. A penalty imposed by the  
48 department pursuant to this section shall be collected and enforced

1 by summary proceedings pursuant to the provisions of the “Penalty  
2 Enforcement Law of 1999,” P.L.1999, c.274 (C.2A:58-10 et seq.).

3  
4 6. This act shall take effect immediately, but shall not apply to  
5 any agreement in effect on or before the date of enactment.

6  
7  
8 STATEMENT

9  
10 This bill places certain limitations on restrictive covenants  
11 between employers and employees. Restrictive covenants are  
12 agreements between employers and employees or anticipated  
13 employees under which the employee or anticipated employee  
14 agrees not to engage in certain specified activities competitive with  
15 the employer after the employment relationship has ended.  
16 Employees are often required to enter into restrictive covenants as a  
17 condition of employment, or as a condition of receiving severance  
18 pay.

19 Under the bill, an employer may require or request that an  
20 employee enter into a restrictive covenant as a condition of  
21 employment or with respect to severance pay. 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 must disclose the  
26 terms of the agreement in writing to the prospective employee. The  
27 agreement must be signed by the employer and the employee and  
28 expressly state that the employee has the right to consult with  
29 counsel prior to signing.

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

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

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

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

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

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

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

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

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

14       The bill also provides that restrictive covenants are not  
15 enforceable against:

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

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

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

29       (4) a seasonal or temporary employee;

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

32       (6) an independent contractor;

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

34       (8) a low-wage employee; or

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

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

43       During any period after the employment relationship has ended  
44 and a covenant is effective, the employer must pay the employee an  
45 amount equal to 100 percent of the pay which the employee would  
46 have been entitled for work that would have been performed during  
47 the period, and continue to make whatever benefit contributions  
48 would be required in order to maintain the fringe benefits to which

1 the employee would have been entitled for work that would have  
2 been performed. A covenant does not permit an employer to  
3 unilaterally discontinue or otherwise fail or refuse to make the  
4 payments except in the event of a breach by the employee. These  
5 requirements do not apply if the employee has been terminated for  
6 misconduct.

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

- 11 (1) when a prohibited agreement was signed;
  - 12 (2) when the employee learns of the prohibited agreement;
  - 13 (3) when the employment relationship is terminated; or
  - 14 (4) when the employer takes any step to enforce the agreement.
- 15 The court has jurisdiction to void any agreement and to order  
16 appropriate relief.

17 The bill also requires employees to post a copy of the bill of a  
18 summary of its requirements in a prominent place in the work area.