

# **Proposed NJ Bill Could Require Employers to Pay Employees During Non-Compete Periods**

**November 2017**

The New Jersey Senate introduced Senate Bill 3518 in November 2017 which aims to limit the use and enforceability of employee non-compete agreements within the State. One of the most noteworthy changes to the existing non-competition laws would be the obligation of an employer to continue paying and providing benefits to a terminated employee during the non-compete period. The Bill is still in its early stages, but considering NJ's recent Democratic takeover, the likelihood that the Bill will pass has increased.

## **What is a non-compete agreement?**

The Bill defines a non-compete agreement as an agreement between employers and employees under which the employee agrees not to engage in certain activities competitive with the employer after employment is over.

## **Why change the rules governing non-competition contracts?**

The New Jersey Legislature believes that non-compete agreements impede development of business by driving skilled workers to other states and by requiring businesses to seek skilled workers from out-of-state. Supposedly these contracts and agreements also discourage innovation and production, impose special hardships on employees and specialized professionals, as well as hinder trade and commerce. By limiting non-compete agreements, legislators hope to stimulate New Jersey's economy by preserving and providing jobs. Bill 3518 is divided into five main areas: **(1)** requirements for drafting an enforceable agreement; **(2)** a description of individuals with whom employers cannot enter into non-compete agreements; **(3)** continuing pay and benefit requirements; **(4)** rights of action and damages for wronged employees; and **(5)** posting requirements.

### **(1) What constitutes an enforceable agreement?**

- a. If an agreement is entered at the start of employment, the employer must make the terms known, in writing, either with the offer of employment, or 30 business days before an employee's first day of work. If the agreement is entered into after an employee has already started working, then the employer needs to provide the terms at least 30 business days before the agreement goes into effect.
- b. The non-compete agreement cannot be broader than what is required to protect the legitimate business interests of the employer. These interests include protecting trade secrets, as well as other confidential information (e.g. sales and client information, business strategies, etc.).
- c. The agreement cannot limit the employee's actions for more than 12 months after termination, and it must be within a reasonable geographic range. In other words, the agreement may only limit an employee's actions in the general area where the worker provided his/her services. Also, the contract cannot prevent a person from finding work outside New Jersey.
- d. The restriction should be limited to the specific types of services the worker provided in the two years before termination.
- e. The contract cannot punish an employee for defending against or challenging the lawfulness or enforceability of the agreement.
- f. If an employee lives or works in New Jersey at the time of termination or 30 days before termination, a non-compete cannot circumvent law by using an alternative choice of law provision.

- g. The agreement may not waive an employee's substantive, procedural and remedial rights in any way.
- h. An employer cannot stop employees from providing services to the employer's clients after termination of employment if the employee did not initiate or solicit the customer.
- i. Finally, the non-compete should not be too burdensome for the employee, meaning the time and geographic scope must be reasonable so as not to prevent employees from participating in successful future businesses. For example, if a company conducts the majority of its business within 50 miles of the main office and the employer requires a 100 mile non-compete radius after termination, then it may be considered overly burdensome. Additionally, the agreement should not be harmful to the public or inconsistent with public policy.

## **(2) Employers cannot require certain employees to enter into a non-compete agreement.**

The list is relatively narrow and includes:

- a. employees classified as nonexempt<sup>1</sup> under the federal Fair Labor Standards Act of 1938
- b. apprentices in programs registered by the Office of Apprenticeship of the U.S. Department of Labor
- c. employees under age 18
- d. undergraduate and graduate students that take internships or participate in short-term employment while enrolled as full-time/part-time students
- e. seasonal and temporary employees, as well as independent contractors, low-wage workers
- f. workers whose length of service has been less than a year

Finally, an employee who has been terminated without good cause<sup>2</sup> or laid off as a result of an employer's actions may not be required to abide by such a contract.

## **(3) What happens after termination?**

Within 10 days after termination, an employer should notify an employee, in writing, that it plans to enforce the agreement. If the employer does not provide this timely notice, then the agreement is void. If an employee was terminated with good cause, then the employer does not have to provide a notice and the agreement is still enforceable.

Arguably the most significant portion of this Bill is the concept of continuing pay and benefits. Essentially, during the non-compete period, the employer must pay the employee 100% of their pay as well

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<sup>1</sup> Nonexempt employees are covered by the Fair Labor Standards Act's minimum wage and overtime pay stipulations. The FLSA requires that overtime must be paid at a rate of one-and-a-half times the regular rate of pay if the nonexempt employee works over 40 hours a week. An employee who is paid hourly is usually classified as nonexempt. The distinction is also given to employees who do not qualify for one of several white-collar exemptions. Generally speaking, clerical, blue-collar, maintenance, construction, semiskilled workers and technicians are all considered nonexempt.

<sup>2</sup> Good cause includes a reasonable basis related to an individual employee for termination of employment in view of relevant factors and circumstances, including: improper or disorderly conduct, working inefficiently, belatedly, or negligently, or violation of the standards of quality. Also, repeated violation of policies established for the operation of the establishment, if a written copy of the policies has been provided to the employee and that those rules are consistently enforced and not applied to a particular employee in a disparate manner without justification. Finally, good cause includes serious misconduct which is directly related to the employment relationship and has a detrimental effect on the employer's business, and in which situation, the only reasonable action that an employer can be expected to take is termination.

as fringe benefits<sup>3</sup>. However, if the worker was terminated for good cause or breached the contract, then he/she would not be eligible for the continuation of pay and benefits.

**(4) Can employees retaliate?**

Employees have the right to bring a civil action if the employer violates the act should it be signed into law. Action can be taken within two years of when the agreement was signed, employment relationship was terminated, or when an employer takes steps to enforce the agreement.

**(5) Posting of applicable law.**

Every employer must post a copy of this act, or a summary of the law, in a prominent work area. Failure to comply would result in a warning for the first violation, a \$250 fine for the second violation, and a \$1,000 fine for every subsequent violation.

Of course, this Bill has a long way to go before it can even be considered for approval by the governor. Most recently the bill has been referred to the New Jersey Senate Labor Committee for consideration. It may be many months, or even years, before a decision is reached. Should Bill 3518 be signed into law, it would represent a considerable change from current NJ laws on non-compete agreements, especially with regards to the continuing pay and benefits section.

*The attorneys at SJK Partners can assist employers in drafting enforceable non-compete arrangements and can assist employees in negotiating such agreements. Contact us at 908-795-2900.*

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<sup>3</sup> 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.