

Proposed State Senate Bill Would Substantially Change Restrictive Covenant Law in New Jersey

Client Advisories

11.30.2017

On November 9, 2017, New Jersey State Senator Robert Gordon introduced Senate Bill 3518, which would make significant changes regarding the presentation and enforcement of restrictive covenants, such as non-compete and non-solicitation agreements, in New Jersey. While the bill was just introduced, if passed, would represent a seismic shift in the ability of New Jersey employers to utilize restrictive covenants.

Under the proposed new law, restrictive covenants would not be enforceable at all for the following categories of workers: (1) non-FLSA-exempt employees; (2) undergraduate or graduate students undertaking internships or short-term employment; (3) apprentices; (4) seasonal or temporary employees; (5) employees whose employment is terminated without good cause; (6) employees who are laid off; (6) independent contractors; (7) employees under the age of 18; (8) "low-wage" employees (using statewide weekly average remuneration); and (9) employees whose period of service is less than one year.

For those employees who do not fall into the categories above, the bill proposes a substantial number of new requirements in order for a restrictive covenant to be effective, including the following:

- If provided at the commencement of employment, the employer must provide the agreement to the employee at least 30 business days in advance of the employment start date;
- If provided during the term of employment, the agreement would not become effective until 30 days have expired;
- If the employee resides or works in New Jersey, the agreement cannot contain a choice-of-law provision that would apply any other state's substantive law;
- The agreement must be signed by both the employer and the employee;
- The agreement must state that the employee has the right to consult with counsel;
- The duration of the restriction must be no more than 12 months;

- The bill prohibits agreements that “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;” and
- The bill requires that, in order for the agreement to be effective, the employer “shall 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 prescribed under this section, 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 during the period prescribed under this section.”

The proposed bill also provides remedies to the employee if the employer violates the statute, including the right to file suit to have the agreement declared void, liquidated damages of up to \$10,000, lost compensation and attorney’s fees.

Importantly for employers, however, the bill states that, if passed, “This act shall take effect immediately, but shall not apply to any agreement in effect on or before the date of enactment.” This means that all employers who currently use, or are considering using, restrictive covenants should take action now to have their contracts reviewed and, if necessary, renewed or presented to their employees before the bill becomes law.

We will monitor the progress of the bill and update you as warranted. In the meantime, if you have questions regarding restrictive covenants, we are here to assist you. Please call us if you need assistance. If you have questions about the potential new law and how it may affect you, please contact **Mark J. Oberstaedt** at 856-354-3072 or moberstaedt@archerlaw.com or **Thomas A. Muccifori** at 856-354-3065 or tmuccifori@archerlaw.com or any member of Archer’s Trade Secret Protection Group in Haddonfield, N.J., at (856) 795-2121, in Princeton, N.J., at (609) 580-3700, in Hackensack, N.J., at (201) 342-6000, in Philadelphia, Pa., at (215) 963-3300, or in Wilmington, Del., at (302) 777-4350.

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