



Employers Beware: New Bills Would Change the Landscape for Restrictive Covenants in New Jersey Employment Contracts

Client Advisories

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Identical bills have been introduced in the New Jersey State Senate (S899) and Assembly (A1650) that would substantially limit the enforceability of new restrictive covenants in employment contracts (such as non-compete agreements). While the proposed law would not apply to existing agreements, it would effectively eliminate the ability of many employers to use restrictive covenants to protect their businesses in the future.

First, the law would eliminate the use of restrictive covenants for a large category of employees. For example, the proposed law would prevent enforcement of restrictive covenants against non-exempt employees, independent contractors, employees earning less than the statewide average weekly remuneration (approximately \$1,291.42), seasonal or temporary employees, those who have been employed for less than one year, interns, apprentices, and minors. The proposal would also prohibit enforcing restrictive covenants when the employer either lays off the employee or otherwise terminates their employment without a finding of misconduct, a departure from existing law.

For employees who do not fall into the prohibited categories, the proposed legislation would severely limit the contents of restrictive covenants. For example, the employer would be prohibited from preventing a former employee from taking employment outside New Jersey, would limit the common law geographic reasonableness test, and would cap the maximum length at one year. The proposed law would also limit the definition of "solicitation" for purposes of a non-solicitation restriction to contact initiated by the former employee. This would represent a notable departure from New Jersey's current common-law approach to these agreements.

Perhaps most significantly, the proposed law would make restrictive covenants less attractive by requiring employers to pay the former employee 100% of their compensation and benefits during the restricted period if they seek to enforce the restrictions, creating a potential chilling effect on their use.

The proposed legislation would also place certain procedural burdens on employers, such as time restrictions on when a restrictive covenant can be presented to a potential employee and the length of time the employer has to advise the employee of an intent to enforce the restrictions after termination. The proposed law would also preclude employers from enforcing a choice-of-law provision that seeks to apply the substantive laws of another state against a New Jersey-based employee. The proposed law also creates new rights for employees, such as the right to challenge the enforceability of the restrictions in court and to recover damages and attorney's fees, or liquidated damages of \$10,000.

In short, this bill would be a game changer for restrictive covenants in employment contracts. The overall result would be fewer new restrictive covenants with fewer restrictions against employees, and less ways for employers to protect their legitimate business interests in the case of side-switching employees.

Because the proposed law would not apply to contracts entered into before the law is signed, employers who are thinking about incorporating restrictive covenants into their business protection strategies should consider doing so now. While similar bills have failed to gain traction in the New Jersey legislature in previous sessions, 2021 is a gubernatorial and Assembly election year, which always raises the profile of legislation that is considered pro-employee. Moreover, some of the public policy concepts could find their way into the common law analysis under existing law. Therefore, employers should regularly review their restrictive covenants to make sure they contain sufficient protections while not crossing the ambiguous enforceability line even under existing law.

For questions regarding restrictive covenants, please contact your Archer attorney or **Mark Oberstaedt** at 856-354-3072 or moberstaedt@archerlaw.com, or **Tom Muccifori** at 856-354-3056 or tmuccifori@archerlaw.com.

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