

What Proposed Noncompete Law Means For NJ Employers

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On May 19, the New Jersey General Assembly's Labor Committee voted in favor of A.B. 3715,[1] which would create significant restrictions on the scope and enforceability of the most common restrictive covenants entered into by New Jersey employees.

While it remains to be seen whether the bill's proposed changes will become law, the passage of A.B. 3715 in its current form would represent a seismic shift for New Jersey employers.

The new bill would significantly reduce the benefit of enforcing a noncompete agreement for all but the most valuable employees of a company, and it would immediately place New Jersey among the most challenging locations in the country for employers seeking to restrict a former employee's employment and activities.

Among its many proposed changes, A.B. 3715 would make restrictive covenants unenforceable against a wide category of workers, including any employee classified as nonexempt under the federal Fair Labor Standards Act; independent contractors; employees who are laid off or terminated for reasons other than misconduct; low-wage employees; seasonal or temporary employees; student interns; and apprentices and employees under the age of 18.

Most notably, the bill would make restrictive covenants unenforceable against an employee whose period of service to an employer is less than one year, with no restrictions based on that employee's knowledge, experience, skillset or compensation.

The bill's one-year provision could potentially incentivize high-ranking employees to leave their positions just before their 365th day of employment and begin working for a competitor without contractual restriction – though they would still be barred from misusing the former employer's trade secrets.

Even for employees who remain subject to restrictive covenants after their employment ends, A.B. 3715 would impose a number of limitations on those agreements that weigh in the employee's favor.

Among the most prominent:

- An employee's noncompete period would be limited to a maximum of 12 months from the employee's termination date, regardless of whether the employee's role might justify a longer period;

- An employer would be required to disclose the terms of its noncompete agreement in writing to any prospective employee at the time a formal offer of employment is made or at least 30 business days before the employee commences employment; and
- The employer would be required to notify the employee in writing of its intent to enforce the noncompete agreement within 10 days of the employee's termination of employment, with the agreement automatically becoming void if the employer fails to do so.

A.B. 3715's most employee-friendly provision may be its 100% of pay requirement, which has the effect of converting any enforceable restrictive covenant period into a de facto garden leave for the departing employee.

Under the terms of the bill, an employer seeking to enforce a restrictive covenant against a departing employee "must pay the employee an amount equal to 100 percent of the pay [to] which the employee would have been entitled for work that would have been performed" during the post-employment period in which the covenant is in effect.

The bill also requires the employer to 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.

Notably, the bill requires the employer to continue paying the employee even if the employee commences employment elsewhere during the restrictive covenant period, and does not allow the employer to unilaterally discontinue payments except in the event of the employee's breach of the restrictive covenant.

Combined with its 10-day notice requirement, the bill's provisions would have the practical effect of forcing employers to immediately decide whether to continue paying the salary and benefits of a departing employee for up to 12 months to prevent the mere possibility that the employee might compete against them later — or risk losing the right to enforce that restriction forever.

A.B. 3715 would also codify existing common-law limitations on restrictive covenants, including requirements that the agreement place reasonable limits on its geographic reach and the scope of its protected activities.

However, the bill would go further than the geographic restrictions typically imposed by New Jersey courts by preventing an employer from "prohibit[ing] an employee from seeking employment in other states."

This limitation on enforcement outside of New Jersey would create significant issues for employers operating in close proximity to neighboring states such as New York and Pennsylvania.

For example, A.B. 3715 would allow an employee working in Jersey City to commence employment with a competitor just two miles away in New York City, even as that same employee would be restricted from competing from a similar distance within the confines of New Jersey.

The proposed New Jersey legislation would also curtail the scope and effectiveness of nonsolicitation provisions typically included in employment agreements.

Specifically, an employer would no longer be allowed to restrict an employee from working with an employer's customers or clients so long as the employee does not initiate or solicit the customer or client.

For employees with close or long-standing customer relationships that preclude the need to initiate such contact, this provision appears to create a clear path for them to sidestep any post-employment nonsolicitation restrictions and continue working with those customers while requiring only a slight workaround.

Unlike recent noncompete legislation in other states, New Jersey's proposed bill would further empower employees by creating a specific cause of action for employees to bring against any employer who violates the bill's requirements.

Beyond simply voiding any employment agreement in violation of the bill, the proposed cause of action would allow a court to award the employee lost compensation, damages, reasonable attorney fees and liquidated damages of up to \$10,000.

While A.B. 3715 would drastically alter the landscape for restrictive covenants in New Jersey moving forward, it does not apply retroactively and will not impact any agreement in effect prior to the date of its enactment.

Regardless of whether the bill is signed into law in its current form, New Jersey employers should expect to face growing scrutiny in the state going forward regarding their use of noncompetes and other restrictive covenants.

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