



Will New Jersey Become the 'Garden Leave' State? Proposed Legislation Would Set Strict Rules for Non-Competes Including Full Pay Requirement

Insights

9.26.22

New Jersey recently joined a growing number of states that have taken legislative efforts to significantly limit the enforceability of post-employment restrictive covenant agreements – such as non-compete and non-solicitation agreements. Notably, if AB 3715 is passed in its current form, employers would be required provide former employees with their full pay and fringe benefits while the post-employment restrictions remain in effect. This arrangement is known as “garden leave” in the U.K. and refers to the idea of providing time for the departing employee to tend to a garden. AB 3715 would add myriad obstacles for employers, require additional procedural steps for businesses, and thwart efforts to engage in common business practices. What do you need to know about this pending legislation?

Drastic Limits to Restrictive Covenants

AB 3715, if passed in current form, would require the following:

1. All post-employment non-compete and non-solicitation agreements would need to be limited to the 12-month period following the employee’s last day of employment, irrespective of individual considerations that would typically justify longer restrictions.
2. You would need to provide all new hires with the terms of any restrictive covenant agreement in writing at the earlier of either:
 - A formal offer of employment being extended; or
 - 30 days prior to the employee’s start date. Likewise, all existing employees would need to be provided with any proposed restrictive covenant agreement at least 30 “business days” before the agreement is scheduled to go into effect.
3. Within 10 days of a departing employee’s last day of work, you would have to provide written notice of your intent to enforce the employee’s restrictive covenant agreement, with the failure to do so rendering the agreement void.
4. You would need to pay to an employee 100% of the their former compensation and continue employer contributions towards the employee’s fringe benefits during the time that any post-employment restrictions remain in effect. In other words, employers would need to provide “garden leave” as an express condition to enforcement.

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AB 3715 would also prohibit employers from taking the following three actions:

1. Restricting former employees from providing services to former customers and clients so long as the former employee does not solicit the former customer or client;
2. Preventing “an employee from seeking employment in other states”; and
3. Including “choice of law” provisions designed to, or having the effect of, avoiding the bill’s requirements by attempting to apply the law of a more favorable jurisdiction.

In addition, A3715 would impose a blanket prohibition on restrictive covenants entered into by the following workers:

- Nonexempt employees under the federal Fair Labor Standards Act;
- Undergraduate and graduate student interns;
- Apprentices;
- Seasonal or temporary employees;
- Employees who are laid off or terminated for reasons other than misconduct;
- Independent contractors;
- Employees under the age of 18;
- Employees who have worked for the employer for less than one year; and
- Low-wage employees.

Further, existing New Jersey common-law limitations would be codified to require that a restrictive covenant:

1. Be no greater than necessary to protect the legitimate interest of the employer;
2. Impose no undue hardship on the employee in terms of geographic scope or duration; and
3. Act in accordance with public policy.

Finally, so called “no-poach” agreements — agreements between competitors not to solicit employees from one another — would be declared void under the bill.

Be Prepared

In May 2022, the New Jersey Assembly Labor Committee voted in favor of AB 3715. Whether the bill in current or a modified form will become law remains to be seen. If A3715 is enacted in whole or in part, it would drastically alter the utility of using restrictive covenants to protect, among other things, customer and employee relationships.

Insofar as the bill's requirements "shall not apply to any agreement in effect on or before the date of enactment," it is recommended that employers review existing restrictive covenant agreements to ensure that they are adequately protected in advance of any further action taken to enact this proposed legislation.

Fisher Phillips will continue to monitor events and provide updates as warranted, so make sure [you are signed up to receive Insights directly to your inbox](#) to receive the latest information. If you have any questions regarding your organization's restrictive covenant agreements, please consult your Fisher Phillips attorney, the author of this Insight, any attorney in our [New Jersey office](#), or any attorney in the [Employee Defection and Trade Secrets](#) practice group.

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