NJBIA
New Jersey Business & Industry Association

10 W Lafayette Street
Trenton, NJ 08608-2002

609-393-7707
www.njbia.org

To: Members of the Assembly Labor Committee

From: Chrissy Buteas, Chief Government Affairs Officer and Alexis Bailey, Director of Government Affairs

Date: May 19, 2022

RE: **NJBIA Opposition to A-3715**- Limits certain provisions in restrictive covenants and limits enforceability of restrictive covenants

---

On behalf of our member companies that make NJBIA the largest statewide business association in the nation, I write to you in opposition to Assembly Bill No. 3715 (Moriarty/Wimberly), which limits the provisions and enforceability of restrictive covenants, such as non-compete, non-solicitation, and confidentiality agreements.

As we try to reclaim New Jersey's status as an innovation state and encourage new startups and increase patents, this legislation runs counter to those goals. It places limits on restrictive covenants, including those that are vital to protect the legitimate interests of businesses, such as protections of trade secrets and proprietary information, solicitation of customers as well as no-poach agreements. We suggest differentiating and clarifying the various types of restrictive covenants to be more precise with what limitations are being placed and exactly which employees they are being placed on.

Exceeds protecting low-income workers: This legislation goes far beyond protecting just low-income earners who logically should not be bound by many post-employment restrictions in order to allow for career advancement. This bill would limit the ability of employers to place post-employment restrictions on higher income earners who may know intimate details about business operations. Higher income earners often have the most leverage when moving between jobs. Courts generally handle situations regarding restrictive covenants and how these employees may be bound by adequately adjudicating the best way to protect the employer and the employee should litigation arise. When assessing restrictive covenants that can be placed on high wage earners, we should have a meaningful discussion on reasonable time and geographic scope restrictions that protect employers and do not severely hinder employees.

- We suggest amending the bill only to cover post-employment restrictions on low-income workers as defined by state statute to cover all employees making roughly less than $65,000 without benefits.
- We also suggest ensuring the bill is clarified to allow employers to place appropriate restrictive covenants which protect proprietary information on all employees and independent contractors.

Limitations on when restrictive covenants can be in place: The proposed legislation makes restrictive covenants unenforceable for employees who have worked for less than

a year for their employer. An employee who works less than a year still has enough time to become familiar with business practices and sensitive information. These arbitrary time frames will not allow employers to adequately protect trade secrets and proprietary information. We suggest removing these measures.

Concern over length of 12-month cap: This legislation creates a 12-month cap on how long a restrictive covenant can be in place. This may make sense for some restrictive covenants, but others may need longer or indefinite time frames to protect employers from the disclosure of trade secrets or proprietary information.

Concern over garden pay: Additionally, this bill has unreasonable and overly burdensome garden pay provisions that will force employers to pay full salary and benefits during the time of the restrictive covenant. This provision even applies to non-disclosure agreements, not just employment limits. Employers will be forced to pay a former employee for 12 months even if that employee negotiated severance or found another job.

Concern over the private right of action provision, liquidated damages, and attorneys' fees: This bill includes several legal remedies that are extremely troublesome for the business community. The inclusion of a private right of action often leads to costly lawsuits with little merit against employers, even for minor, inadvertent paperwork violations. The bill also provides for liquidated damages and attorneys' fees which will encourage class action suits with the goal of large payouts. On top of this, employees who are subject to a restrictive covenant have two years to bring action against any employer or person who has violated a provision of the bill. This time frame coupled with the extensive legal remedies mentioned above will drive up the cost of doing business in our state.

Concern over geographic limitations of out-of-state employment: The prohibition on restricting employees from seeking employment out-of-state as currently written in the bill does not make sense for New Jersey. In a state like ours, where many residents reside close to our neighboring states, geographic limitations are feasible and necessary to protect the legitimate business interests of an employer. For example, if a business owner in Trenton wants to place a post-employment restriction on an employee, but they were not allowed to limit them seeking employment out of state, that employee could work at a competitor business in Pennsylvania that is just minutes away from their previous employer. Geographical limitations should be able to include employment in other states if it is within a certain radius of the employer.

Concern over the elimination of no-poach agreements: The elimination of no-poach agreements entirely is not necessary for the public good as indicated in this legislation. We suggest more narrowly defining exactly when the use of no-poach agreements should be restricted rather than creating a one-size-fits all ban.

The Federal FLSA definition of non-exempt is too broad: The provision of this legislation that states restrictive covenants are not enforceable if an employee is considered non-exempt under the federal Fair Labor Standards Act is too broad of a standard. This standard would make restrictive covenants unenforceable even for highly competitive,

well-paid positions such as nonexempt salespeople. As previously mentioned, we suggest relying on state statute to exclude low-wage workers from post-employment restrictions rather than relying on the broad FLSA nonexempt definition.

10-day notice requirement following termination of employment is too short: The bill provides that, not later than 10 days after the termination of an employment relationship, the employer must notify the employee in writing of the employer's intent to enforce the agreement. If the employer fails to provide notice, the agreement is void. This provision provides a very short window in which to decide if the restrictive covenant will be enforced and should be increased.

Signage requirements are increasingly ineffective for informing employees: Lastly, the bill also requires employers to *post a copy of the bill or a summary of its requirements* in a prominent place in the work area. Given the voluminous and ever-increasing amount employment notices that are required, this tactic is becoming less effective to communicate information to employees who generally disregard physical signs in the workplace.

Thank you for the opportunity to provide testimony on this legislation. We look forward to continuing this dialogue with the sponsor.