

5616

2011-2012 Regular Sessions

I N S E N A T E

June 7, 2011

Introduced by Sen. GOLDEN -- read twice and ordered printed, and when printed to be committed to the Committee on Labor

AN ACT to amend the labor law, in relation to enacting the broadcast employees' freedom to work act; and to repeal certain provisions of such law relating thereto

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. This act shall be known and may be cited as the "broadcast
2 employees' freedom to work act".
3 S 2. Section 202-k of the labor law is REPEALED and a new section
4 202-k is added to read as follows:
5 S 202-K. PROTECTION OF PERSONS EMPLOYED IN THE BROADCAST INDUSTRY. 1.
6 DEFINITIONS. FOR THE PURPOSES OF THIS SECTION:
7 (A) "BROADCASTING INDUSTRY EMPLOYER" INCLUDES (I) TELEVISION STATIONS
8 OR NETWORKS, RADIO STATIONS OR NETWORKS, OR CABLE STATIONS OR NETWORKS,
9 (II) INTERNET OR SATELLITE-BASED SERVICES SIMILAR TO A BROADCAST STATION
10 OR NETWORK AND THAT PROVIDE COVERED BROADCASTING SERVICES, AND (III) ANY
11 OTHER ENTITY THAT PROVIDES COVERED BROADCASTING SERVICES.
12 (B) "COVERED BROADCASTING SERVICES" SHALL MEAN THE PROVISION OF BROAD-
13 CASTING SERVICES SUCH AS NEWS, WEATHER, TRAFFIC, SPORTS, OR ENTER-
14 TAINMENT REPORTS, OR OTHER FORMS OF CONTENT PROGRAMMING; PROVIDED THAT
15 FOR PURPOSES OF THIS SECTION, AN ENTITY SHALL NOT BE PRESUMED TO BE
16 ACTIVELY ENGAGED IN THE PROVISION OF COVERED BROADCASTING SERVICES
17 UNLESS AT LEAST THIRTY PERCENT OF ITS ASSETS OR EMPLOYEES ARE DEDICATED
18 PRIMARILY TO THE PROVISION OF SUCH SERVICES.
19 (C) "BROADCAST EMPLOYEE" SHALL MEAN (I) ANY ON-AIR EMPLOYEE OR (II)
20 OFF-AIR EMPLOYEE OF A BROADCASTING INDUSTRY EMPLOYER PROVIDING DIRECT
21 SUPPORT OR SERVICES TO ANY ON-AIR EMPLOYEE, EXCLUDING MANAGEMENT EMPLOY-
22 EES.
23 (D) "MANAGEMENT EMPLOYEE" SHALL MEAN AN EMPLOYEE (I) WHOSE PRIMARY
24 DUTY CONSISTS OF THE MANAGEMENT OF THE ENTERPRISE IN WHICH SUCH INDIVID-

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets
[] is old law to be omitted.

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1 UAL IS EMPLOYED OR OF A CUSTOMARILY RECOGNIZED DEPARTMENT OR SUBDIVISION
2 THEREOF; (II) WHO CUSTOMARILY AND REGULARLY DIRECTS THE WORK OF TWO OR
3 MORE OTHER EMPLOYEES THEREIN; (III) WHO HAS AUTHORITY TO HIRE OR FIRE
4 OTHER EMPLOYEES OR MAKE SUGGESTIONS AND RECOMMENDATIONS AS TO HIRING OR
5 FIRING AND AS TO THE ADVANCEMENT AND PROMOTION OR ANY OTHER CHANGE OF
6 STATUS OF EMPLOYEES; AND (IV) WHO CUSTOMARILY AND REGULARLY EXERCISES
7 DISCRETIONARY POWERS.

8 (E) "REQUIRE AS A CONDITION OF EMPLOYMENT" SHALL MEAN TO IMPOSE ON ANY
9 BROADCAST EMPLOYEE A COVENANT NOT TO COMPETE AS AN EXPRESS MANDATORY
10 OBLIGATION IN CONNECTION WITH (I) AN OFFER OF EMPLOYMENT OR PROPOSED
11 CONTRACT FOR EMPLOYMENT OR REEMPLOYMENT OR (II) CONTINUED EMPLOYMENT;
12 PROVIDED THAT THE GRANT OF ANY AWARD OR BENEFIT THE FORFEITURE OF WHICH
13 MAY RESULT FROM A BREACH OF A COVENANT NOT TO COMPETE SHALL NOT BE
14 DEEMED TO IMPOSE ON ANY BROADCAST EMPLOYEE A COVENANT NOT TO COMPETE.

15 (F) "COVENANT NOT TO COMPETE" SHALL MEAN ANY CONDITION OF EMPLOYMENT
16 FALLING WITHIN THE PROVISIONS OF SUBDIVISION TWO OF THIS SECTION.

17 2. NONCOMPETITION. A BROADCASTING INDUSTRY EMPLOYER SHALL NOT REQUIRE
18 AS A CONDITION OF EMPLOYMENT, WHETHER IN AN EMPLOYMENT CONTRACT OR
19 OTHERWISE, THAT A BROADCAST EMPLOYEE OR PROSPECTIVE BROADCAST EMPLOYEE
20 REFRAIN FROM OBTAINING EMPLOYMENT:

21 (A) IN ANY SPECIFIED GEOGRAPHIC AREA;

22 (B) FOR A SPECIFIC PERIOD OF TIME; OR

23 (C) WITH ANY PARTICULAR EMPLOYER OR IN ANY PARTICULAR INDUSTRY;

24 IN EACH CASE, AFTER THE CONCLUSION OF EMPLOYMENT WITH SUCH BROADCASTING
25 INDUSTRY EMPLOYER. THIS SECTION SHALL NOT APPLY TO PREVENTING THE
26 ENFORCEMENT OF SUCH A COVENANT DURING THE TERM OF AN EMPLOYMENT
27 CONTRACT.

28 3. EXCLUSIONS. THIS SECTION SHALL NOT PREVENT:

29 (A) THE ENFORCEMENT BY A BROADCASTING INDUSTRY EMPLOYER OF SUCH A
30 COVENANT NOT TO COMPETE DURING THE REMAINING TERM OF EMPLOYMENT AS SET
31 FORTH IN AN EMPLOYMENT AGREEMENT BETWEEN A BROADCAST EMPLOYEE AND A
32 BROADCASTING INDUSTRY EMPLOYER, IN THE EVENT THAT THE EMPLOYMENT OF THE
33 BROADCAST EMPLOYEE IS TERMINATED FOR ANY REASON;

34 (B) THE ENFORCEMENT BY A BROADCASTING INDUSTRY EMPLOYER OF A COVENANT
35 NOT TO COMPETE, NOT REQUIRED AS A CONDITION OF EMPLOYMENT, BUT AGREED TO
36 BY A BROADCAST EMPLOYEE IN EXCHANGE FOR ADDITIONAL AND INDEPENDENT
37 CONSIDERATION SUCH AS SEVERANCE OR ANY OTHER POST-TERMINATION BENEFIT OR
38 ARRANGEMENT;

39 (C) THE ENFORCEMENT BY A BROADCASTING INDUSTRY EMPLOYER OF AN EXCLU-
40 SIVE GOOD-FAITH NEGOTIATION PROVISION UNDER WHICH, DURING THE TERM OF
41 EMPLOYMENT AND FOR A REASONABLE PERIOD (BUT IN ANY EVENT AT LEAST NINETY
42 DAYS FROM THE TERMINATION OF A BROADCAST EMPLOYEE'S EMPLOYMENT AGREEMENT
43 OR ARRANGEMENT), SUCH BROADCAST EMPLOYEE HAS AGREED TO NEGOTIATE EXCLU-
44 SIVELY AND IN GOOD FAITH WITH HIS OR HER EMPLOYER OR FORMER EMPLOYER (AS
45 THE CASE MAY BE) BEFORE ENTERING INTO NEGOTIATIONS WITH, OR ACCEPTING
46 EMPLOYMENT WITH, ANY OTHER PARTY;

47 (D) THE ENFORCEMENT BY A BROADCASTING INDUSTRY EMPLOYER OF A RIGHT OF
48 FIRST REFUSAL UNDER WHICH, FOR A REASONABLE PERIOD (BUT IN ANY EVENT AT
49 LEAST NINETY DAYS FROM THE TERMINATION OF A BROADCAST EMPLOYEE'S EMPLOY-
50 MENT AGREEMENT OR ARRANGEMENT), SUCH BROADCAST EMPLOYEE HAS AGREED TO

51 (I) PROVIDE HIS OR HER FORMER EMPLOYER WITH NOTICE OF THE MATERIAL TERMS
52 OF ANY OTHER OFFER OF EMPLOYMENT; (II) PROVIDE HIS OR HER FORMER EMPLOY-
53 ER WITH A RIGHT TO MATCH THAT OFFER; AND (III) ACCEPT A MATCHING OFFER
54 MADE BY THE FORMER EMPLOYER;

1 (E) THE ENFORCEMENT BY A BROADCASTING INDUSTRY EMPLOYER OR ANY
2 POST-CONTRACTUAL RESTRICTION FOR A BROADCAST EMPLOYEE EARNING MORE THAN
3 ONE HUNDRED THOUSAND DOLLARS ANNUALLY; OR

4 (F) THE ENFORCEMENT BY A BROADCASTING INDUSTRY EMPLOYER OF ANY
5 POST-CONTRACTUAL CONFIDENTIALITY OR NON-DISCLOSURE PROVISION IN THE
6 BROADCAST EMPLOYEE'S CONTRACT.

7 4. DAMAGES. ANY PERSON WHO VIOLATES THIS SECTION SHALL BE CIVILLY
8 LIABLE TO A BROADCAST EMPLOYEE FOR DIRECT AND ACTUAL DAMAGES ONLY (AND
9 NOT CONSEQUENTIAL OR PUNITIVE DAMAGES), AS WELL AS ATTORNEY'S FEES AND
10 COSTS.

11 S 3. Waiver. The protections provided by section 202-k of the labor
12 law, as added by section two of this act, may not be waived, and any
13 clause, covenant or agreement to waive such prohibition shall be null
14 and void and may not be enforced against the parties in any court or
15 other jurisdiction.

16 S 4. This act shall take effect immediately; provided that the
17 provisions of this act are retroactive and shall apply only to contracts
18 entered into, renewed, or extended on or after August 5, 2008; provided
19 further that the provisions of this section shall not apply to any
20 broadcasting industry employer seeking to enforce a written covenant not
21 to compete that was in effect prior to August 5, 2008 and that has not
22 otherwise been renewed or extended after such date, regardless of wheth-
23 er the termination of employment of a broadcast employee occurs prior to
24 or after the effective date of this act.