STATE OF NEW YORK

8440

2021-2022 Regular Sessions

IN ASSEMBLY

November 17, 2021

Introduced by M. of A. DINOWITZ -- read once and referred to the Committee on Labor

AN ACT to amend the labor law, in relation to allowing employers and employees to enter into restrictive covenants in certain circumstances

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The labor law is amended by adding a new section 191-d to read as follows:

§ 191-d. Restrictive covenants. 1. For the purposes of this section, the following terms shall have the following meanings:

a. "Employee" means an employee as defined in subdivision two of section one hundred ninety of this article, including an individual employed in a supervisory, managerial, or confidential position.

b. "Employer" includes any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service, and shall include the state and its instrumentalities and political subdivisions, governmental agencies, public corporations, and charitable organizations.

c. "Fringe benefit" means any vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, pension benefit plan, or any other benefit of economic value, to the extent that the leave, plan, or benefit is paid for in whole or in part by the employer.

d. "Good cause" means a reasonable basis related to an individual employee for termination of the employee's employment in view of relevant factors and circumstances, which may include but is not limited to:

(i) the employee engaging in a pattern of improper or disorderly conduct;

(ii) not working in an efficient manner, or working belatedly and negligently, or in violation of the standards of quality of the establishment;

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

LBD13412-02-1

(iii) repeated violation of reasonable rules or policies established for the operation of the establishment, provided a written copy of the rules or policies has been provided to the employee, provided that any standards, rules or policies are consistently enforced and not applied to a particular employee in a disparate manner without justification; or

(iv) for serious misconduct which is directly related to the employment relationship and has a detrimental effect on the employer's business, and in which situation the employer cannot reasonably be expected to take any course other than to terminate the employment of the employee.

e. "Restrictive covenant" means an agreement between an employer and an employee arising out of an existing or prospective employment relationship, or an agreement between an employer and an employee with respect to severance pay, under which the employee or prospective employee agrees not to engage in certain specified activities in competition with the employee's employer after the employment relationship has terminated.

2. An employer may require or request that an employee enter into a restrictive covenant as a condition of employment or with respect to severance pay as provided in this section. A restrictive covenant shall be enforceable to the extent that it meets the following requirements:

a. (i) where the restrictive covenant is a condition to commencement of employment, the employer shall disclose the terms and conditions of such covenant in writing to the prospective employee either at the time a formal offer of employment is tendered or thirty business days prior to the commencement of such employment, whichever occurs earlier; or

(ii) where a restrictive covenant is a condition to continue existing employment, or as a condition for an employee to receive severance pay following termination, the employer shall provide the terms and conditions of such covenant in writing to the employee at least thirty business days before any such covenant is to take effect; and

(iii) the agreement shall be signed by both parties and shall expressly state that the employee has the right to consult with counsel prior to signing.

b. The agreement shall be no more restrictive than necessary to protect the legitimate business interests of the employer, and shall be limited to protecting the employer's trade secrets.

c. The agreement shall be reasonable in the scope of proscribed activities in relation to the interests protected and limited to only the specific types of services provided by the employee at any time during the last two years of employment.

d. The agreement shall not penalize an employee for defending against or challenging the validity or enforceability of the covenant.

e. The agreement shall not contain a choice of law provision that would have the effect of avoiding the requirements of this section, if the employee is a resident of or employed in the state at the time of termination of employment and has been for at least thirty days immediately preceding the termination of such employment.

f. The agreement shall not waive an employee's substantive, procedural and remedial rights provided under this chapter, under any other law, rule or regulation, or under the common law.

g. The agreement shall not restrict an employee from providing a service to a customer or client of the employer, if the employee does not initiate or solicit the customer or client.

h. The agreement shall not restrict an employee from working with one or more other employees who may also have worked for or with the employer in any capacity.

i. The agreement shall not be unduly burdensome on the employee, injurious to the public, or inconsistent with public policy.

j. The employee is terminated for good cause or the employee resigns from the employer on their own accord. A restrictive covenant shall not be enforceable if an employer terminates an employee without good cause.

3. Every employer shall provide its employees with a written document regarding such employer's policy on good cause with respect to termination.

4. The commissioner shall have the power to receive, investigate, attempt to resolve, and enforce a complaint of a violation of this section and shall impose a civil fine in an amount not to exceed five thousand dollars for each employee who was the subject of such violation.

5. The provisions of this section shall not apply to employees covered under section two hundred two-k of this chapter.

§ 2. Severability clause. If any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein.

§ 3. This act shall take effect on the sixtieth day after it shall have become a law and shall apply to agreements entered into on or before such date.