

LABOR & EMPLOYMENT

ALERT

NJ LEGISLATURE TO TAKE ON ENFORCEMENT OF NON-COMPETES

By Ian D. Meklinsky

On April 4, 2013, Assembly Bill 3970 was introduced in the New Jersey Legislature. The bill would invalidate any covenant, contract, or agreement not to compete, not to disclose, or not to solicit, entered into by any individual with the individual's most recent employer, if the individual is found to be eligible for unemployment compensation benefits. The bill would not, however, apply to any covenant, contract, or agreement entered into before the effective date of the law should it be enacted.

The text of the bill can be found [here](#).

This bill, if enacted, would cause significant issues for employers in New Jersey. By way of example, employers would lose any contractual ability to prevent an employee from being employed by a direct competitor. Additionally, by the explicit language of the bill, an employer would not be able to enforce – at least by contract – any confidential information non-disclosure clause. Furthermore, the bill does not make any distinction in the enforcement of covenants in the case where employees are terminated for bad acts.

The enforceability of these types of agreements has, in New Jersey, been determined by the courts based upon a number of factors all judged against the backdrop of an employer's interest in protecting its legitimate business interests. The standards established by the courts are not

unique or troublesome and have been fleshed out over the years through a well-defined body of case law. To shift the forum for litigating the enforcement of these types of agreements to the unemployment compensation arena – an arena where there is little, if any, discovery and the presumption is that the employee is entitled to benefits – will force employers not only to litigate the benefit eligibility before the administrative agency but to potentially appeal all the way to the appellate courts. This is simply a bad idea.

While some employers may not view the bill as directly impacting their businesses today, they might feel differently in the future especially if an employee is promoted to a more critical position within the organization with access to the “secret formula” or a critical business plan. In order to provide for the most protection in the future, should the bill be enacted, employers should consult [today](#) with legal counsel and put in place a plan to have as many employees enter into these types of agreements now so they are enforceable in light of the fact that the bill does not apply retroactively.

If you have questions about this Alert, please contact Ian D. Meklinsky at 609.895.6756 or imeklinsky@foxrothschild.com, or any member of Fox Rothschild's [Labor & Employment Department](#).