

# **New Jersey Library Association**

## **Employment Contracts From A to Z In New Jersey**

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## Employment Contract Summary

1. Employment Agreement	Establishes the terms and conditions of an employee's employment.
2. Independent Contractor Agreement	Establishes a relationship in which an individual or business (independent contractor) will perform specific services without becoming an employee.
3. Relocation Agreement	Establishes the terms and conditions of an employee's relocation to a new residence as part of an offer of employment and/or continued employment.
4. Consent Agreement	Contains an employee's authorization allowing your Library to take actions that could otherwise be considered an invasion of the employee's privacy.
5. Non-Compete Agreement	Restricts an employee from accepting a job with a competitor.
6. Confidentiality Agreement	Prohibits an employee from disclosing information about your Library to another entity or other third-party.
7. No-Solicitation Agreement	Prohibits an employee who resigns or is terminated from soliciting your employees.
8. Arbitration Agreement	Requires an employee to resolve workplace disputes through arbitration, as opposed to filing a lawsuit in state or federal court.
9. Last Chance Agreement	Contains an employee's acknowledgement that he/she has engaged in prior misconduct and that any future misconduct, no matter how minor, will result in his/her immediate discharge.
10. Separation Agreement	Establishes the terms and conditions of an employee's separation of employment, and will usually contain the employee's agreement to waive all claims he/she may have against your Library.

## **Employment Contracts From A to Z In New Jersey**

In a survey conducted by the Society for Human Resource Management, 53 percent of its members have been named as a defendant in an employment-related lawsuit — 90 percent of those lawsuits were brought by a former employee. According to another recent survey, more than 450 employment lawsuits are filed every day. Almost half of those cases involve entities ranging from 15 to 100 employees in size.

In their efforts to shield themselves from workplace liability, most employers follow the advice to “GET IT IN WRITING.” Yet, many entities are simply unsure what it is that needs to be written down. Even more frustrating is when employers discover that the written document they prepared does not accomplish the intended goal or, even worse, undermines their position in litigation.

This seminar outlines 10 different employment contracts that your Library may consider, as well as the types of provisions that the contracts should contain. A properly drafted contract can insulate your Library from liability and help avoid the misunderstandings and ambiguities that lead to employment-related lawsuits.

### **1. Employment Agreement - Establishes the terms and conditions of an employee’s employment with your Library.**

An employment agreement is typically entered into when first hiring a high level employee. The agreement generally specifies the employee’s compensation (wages and benefits), as well as his/her job duties and responsibilities.

The agreement may also reiterate the at-will nature of the individual’s employment. This type of provision confirms that the employee can be discharged for

any reason, with or without notice, so long as the reason is not unlawful. Conversely, some employers may include a provision in the agreement indicating that the individual's employment will be for a fixed number of months or years, and specify what kinds of behavior will cause the employee to be fired prior to expiration of the agreement. By placing their goals in writing, the parties can minimize the possibility of a future dispute as to what they each expected from the other.

**A. The Employee's Responsibilities**

1. Exclusivity
2. Good faith & best efforts
3. Duty of loyalty
4. Job duties
5. Employer's right to modify job duties

**B. The Employer's Commitments**

1. Salary
  - (a) Hourly
  - (b) Salary
  - (c) Exempt v. Non-exempt
  - (d) Frequency of payment
2. Bonuses/Commissions
  - (a) Eligibility requirements
  - (b) Incentive-based
  - (c) Discretionary v. fixed thresholds

- (d) Determining when a bonus/commission is earned
- (e) Determining when a bonus/commission is payable
- (f) Pre-conditions and forfeiture provisions
- (g) Deductions and give-backs

3. Benefits

- (a) Medical
- (b) Pension/401(k)
- (c) Insurance

4. Paid Time Off

- (a) Accrual method v. prospective grant
- (b) Determining when it can be used
- (c) Subject to business needs
- (d) Payout for unused PTO
- (e) FMLA

**C. Duration of Agreement**

- 1. At-will
- 2. Fixed term
  - (a) Grounds for early termination of the agreement by the parties
  - (b) Consequences of early termination on salary, bonus, commission and paid time off
  - (c) Renewal of agreement

**D. Severance Benefits**

1. Discretionary v. fixed plan
2. COBRA payments
3. Unemployment insurance
4. No other benefits other than those in the agreement

**E. General Provisions**

1. Severability
2. Assignment
3. Integration
4. Modification procedures
5. Choice of law/choice of venue

**2. Independent Contractor Agreement – Establishes a relationship in which an individual or business (independent contractor) will perform services for the Library, without becoming an employee.**

Under an independent contractor agreement, you can arrange for the independent contractor to perform services for the Library, without having to hire the independent contractor (or its workers) as an employee. The benefit of this relationship is that the Library can avoid many of the liabilities it would ordinarily face if you were to hire the contracting entity as an employee. For example, in an independent contractor relationship, you are typically not required to withhold taxes, or provide unemployment insurance or workers' compensation coverage for the independent contractor or its employees. Also, an independent contractor relationship may shield you from liability

under various state and federal employment laws that only apply to employees of an employer.

To qualify as an independent contractor, the contracting individual or business must retain the authority to determine what work needs to be performed and, more importantly, how it should be performed. While there are several different tests for determining who qualifies as an independent contractor, control over the direction and performance of the service is the key factor. Therefore, to receive the benefits of this type of arrangement, you are going to give up some of the control you usually have over your employees. Nevertheless, by placing the independent contractor's relationship with your Library in writing, you will be in a better position to argue that the Library is exempt from many of the liabilities of an employer-employee arrangement.

**A. Typical Provisions**

1. Fixed term
2. Services to be performed
3. Payment
4. Liability for independent contractor's personnel
5. Indemnification
6. Termination provisions
7. Independent contractor's duties and responsibilities
8. Independent contractor's right to control manner and means of performance
9. Compensation on project or commission basis

10. Independent contractor is responsible for payment of taxes and insurance

**3. Relocation Agreement - Establishes the terms and conditions of an employee's relocation to a new residence as part of an offer of employment and/or continued employment.**

Entities that recruit employees from distant areas or engage in long searches often use relocation agreements to entice high quality employees to join. The agreement will establish whether the employee is going to be reimbursed for any expenses associated with his/her relocation, and it will reiterate the time periods in which the employee must complete the move. If properly drafted, a relocation agreement can alleviate the ambiguities and uncertainties that are often caused by such transitions.

**A. New-hire**

1. Payment for move
2. Liability for move
3. Method of acceptance
4. Right to revoke offer of employment
5. Reimbursement of expenses if employment ends

**B. Existing Employee**

1. Payment for move
2. Liability for move
3. Transfer of accrued benefits
4. New terms of employment

5. Seniority

4. **Consent Agreement - Contains an employee's authorization allowing your Library to take actions that could otherwise be considered an invasion of the employee's privacy.**

Ensuring a safe and productive job environment means that employer's must monitor the activities of your workforce, while simultaneously balancing the employees' privacy rights. Naturally, there may be occasions when you need to search property, as well as employees and their personal property. To reduce the risk of an employee claiming that you "invaded his/her privacy," your Library can enter into a consent agreement with the employee that authorizes you to conduct various searches.

For example, the agreement will state that the employee acknowledges that your Library is authorized to: conduct drug testing; search the employee's desk, locker, pocketbook and briefcase; monitor his/her e-mails; and photograph or tape record his/her activities. These types of agreements reduce your employees' expectations of privacy, as well as the possibility of them feeling that your Library violated their privacy during a search. Consent agreements also place employees on notice that you will be monitoring them, which will usually reduce the likelihood that they will engage in workplace misconduct.

**A. Getting Permission**

1. Invasion of privacy claims
2. Disparate treatment claims

**B. Placing Employee on Notice**

1. Good deterrent

**C. Examples**

1. Drug-testing
2. Search policies
3. E-mail policies

**5. Non-Compete Agreement - Restricts an employee from accepting a job with a competitor.**

Most businesses invest substantial time and money in training their employees to better serve clients and customers. The danger is that these same employees could use their skills and knowledge to benefit a competitor and leave your Library in a deficit.

With a non-compete agreement, you can prohibit an employee from working for a specific “competitor.” This restriction will be in effect during the individual’s employment, as well as for a reasonable period of time after his/her termination. In order for a non-compete agreement to be enforceable against an employee, it must be reasonable in its restrictions so that the agreement is no more restrictive than necessary. Put simply, you cannot prevent a worker from accepting a job with another employer when doing so will not substantially harm you. Also, the agreement must not restrain the employee for an unreasonably long time period. Naturally, a determination of what qualifies as reasonable depends on the precise factual circumstances. Nevertheless, non-compete agreements are widely recognized as extremely useful tools.

**A. Employer’s Need for Restriction**

1. Protect confidential information

2. Protect customer contacts
3. Other business justification

**B. Length of Restriction**

1. Reasonable length of time

**C. Geographic Scope of Restriction**

1. Reasonable territorial limitation

**D. Activity restrictions**

**E. Enforcement of Non-Compete Agreement**

1. Legitimate business justification for enforcement
2. Reasonableness of restriction on employee's ability to earn a living
3. Reasonableness of restriction as to general public

**6. Confidentiality Agreement - Prohibits an employee from disclosing information about your Library to third parties.**

In the day-to-day course of your operations, you must often provide employees with confidential information about the business which, if disclosed to a third party, could cause harm. The exact nature of confidential information varies from job to job, so these types of agreements are very industry specific. In a confidentiality agreement, your employee acknowledges your lawful right to protect your confidential information. Additionally, the employee agrees that he/she will not disclose confidential information to a particular employer or entity, unless you advise him/her otherwise.

**A. Protecting Confidential Information**

**B. Defining Confidential Information**

1. Proprietary
2. Trade-Secrets
3. Public knowledge

**C. Determining How Confidential Information is Acquired**

1. Expense to employer
2. Expense to client

**D. Return of Confidential Information**

1. Information removed
2. Information in personal files

**E. Non-Disclosure of Confidential/Information**

**7. No-Solicitation Agreement - Prohibits an employee who resigns or is terminated from soliciting your employees.**

To prevent your employees from luring away your current employees, you may consider a no-solicitation agreement. Put simply, a no-solicitation agreement prohibits a former employee from soliciting, either directly or indirectly, your employees for a reasonable period of time. These agreements can be entered into when the employee begins his/her employment, or as part of a separation agreement when an individual leaves.

**8. Arbitration Agreement - Requires an employee to resolve work-place disputes through arbitration, as opposed to filing a lawsuit in state or federal court.**

Litigating employment claims in state and federal court is expensive and time-consuming. To avoid the burdens and financial liabilities of litigation, you can enter into

an arbitration agreement with an employee when he/she is first hired, or when an employee has filed a lawsuit or is threatening to sue. An arbitration agreement requires the employee to resolve his/her employment dispute before a mutually selected arbitrator, as opposed to going to court to litigate the case. The arbitrator will listen to witness testimony and consider documentary evidence. Significantly, arbitration removes the threat of a “runaway jury” that simply distrusts employers. Also, arbitration hearings usually only last one or two days and can be initiated almost immediately, versus court proceedings that can span over a decade. Arbitration is certainly a faster and less expensive way to resolve employment-related claims.

**9. Last Chance Agreement - Contains an employee’s acknowledgment that he/she has engaged in prior misconduct and that any future misconduct, no matter how minor, will result in his/her immediate discharge.**

It’s a common scenario - the employer has a worker with a lengthy disciplinary history, yet it decides that it will give the individual one last chance to shape up. Last chance agreements are the most underutilized tool that employers can use to properly document an employee’s disciplinary history and to prepare its defense in the event the employee sues the Library after being fired. In a last chance agreement, your Library can get a troublemaker to acknowledge that his/her prior misconduct and poor performance warrants immediate termination, but the employer is giving him/her one last chance to act appropriately. Furthermore, the agreement contains the employee’s admission that his/her next violation of work rules (no matter how minor) will result in immediate termination.

**10. Separation Agreement - Establishes the terms and conditions of an employee's separation of employment and will usually contain the employee's agreement to waive all claims he/she may have against your Library.**

Regardless of whether an individual leaves voluntarily or involuntarily, you may consider entering into a separation agreement indicating the reason for the employee's departure, as well as whether you will provide severance payments or contest his/her right to receive employment insurance. More importantly, your separation agreement should contain a provision in which the departing employee agrees to release certain claims that he/she may have against your Library. A release of claims means that the employee will waive any right that he/she may have to file a lawsuit against your Library.

These types of agreements are very legally dense and should be written in combination with your legal advisors.