

New York Soon to Ban Non-Compete Agreements

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By: Naureen Amjad, Kevin Borozan

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Executive Summary

- On June 20, 2023, the New York State Assembly passed A1278B (the “Bill”), which would prohibit employers from entering into non-compete agreements with their employees.
- The Bill does not retroactively invalidate non-compete agreements but would ban those entered into or modified after its effective date. If signed by Governor Kathy Hochul, the Bill would take effect 30 days thereafter.
- If signed into law as expected, New York would join a growing group of jurisdictions banning non-competes, including California, Minnesota, North Dakota, Oklahoma, and Washington, D.C.

Key Features of the Bill

The Bill would create a new section of the New York Labor Law, NY Lab Law 191-d, prohibiting employers from seeking, requiring, demanding, or accepting a “noncompete agreement” from any “covered individual.” The Bill defines these terms broadly as follows:

- A “noncompete agreement” is “any agreement, or clause contained in any agreement, between an employer and a covered individual that prohibits or restricts such covered individual from obtaining employment, after the conclusion of employment with the employer included as a party to the agreement.” (emphasis added)
- A “covered individual” is “any other person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that they are, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person.”

The Bill grants employees and contractors a private right of action to sue any employer or person who violates the noncompete ban, and such lawsuit can be filed within two years of: (i) when the non-compete agreement was signed; (ii) when the employee or contractor learns of the non-compete; (iii) when the employment or contractual relationship ends; or (iv) when the employer takes steps to enforce a non-compete provision.

Further, the Bill authorizes courts to void any non-compete agreement which violates the statute and order any other appropriate relief, including enjoining the alleged unlawful conduct of any person or employer, and

awarding the impacted covered individual the following remedies: (i) lost compensation; (ii) damages; (iii) attorneys' fees and costs; and (iv) liquidated damages up to \$10,000.

Exceptions

Notably, the Bill does not broadly cover all restrictive covenants. Section 191-d(5) creates a carve-out for certain other types of restrictive covenants or agreements. Permissible agreements include:

- Agreements with a prospective or current covered individual that establishes a fixed term of service;
- Agreements prohibiting disclosure of trade secrets, of confidential and proprietary client information; and
- Agreements prohibiting solicitation of clients of the employer that the covered individual learned about during employment.

Each such agreement will be considered an exception under the Bill "provided that such agreement does not otherwise restrict competition . . ."

Agreements prohibiting the solicitation of employees are not addressed by the Bill.

Important Takeaways for Employers

The described legislation would have significant repercussions for New York businesses that rely on non-competes to protect their legitimate business interests. Once the Bill goes into effect, employers will need to ensure that agreements used or even modified thereafter do not contain non-compete covenants, or may risk litigation.

In the interim, employers with operations and/or employees in New York should carefully review their template non-compete restrictions in preparation for the anticipated effective date of the legislation. Employers should ensure that the restrictions they place on employees and contractors to prevent disclosure of confidential and proprietary information and improper client solicitation are drafted in a manner that would not be deemed to restrict competition in violation of the Bill.

Employers with operations and/or employees in New York that wish to discuss the potential impact of this legislation on their business, can contact Naureen Amjad, Kevin S. Borozan or any member of Masuda Funai's Employment, Labor and Benefits Group.