

New York Advances Towards Banning All Non-Competes

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Earlier this week, the New York State legislature passed a bill banning all non-competes entered into on or after 30 days past the bill's enactment, including those entered into by employees or in connection with the sale of a business. If the bill becomes law, it would make New York the fifth state in the U.S. to enact a ban on non-competes. California, Minnesota, North Dakota, and Oklahoma have also enacted bans on non-competes, but theirs do not go as far as New York's full ban, instead banning only employee non-competes, but preserving those that are entered into in connection with the sale of a business.

The bill now must be transmitted to Governor Kathy Hochul at any time before year end. Once transmitted, Governor Hochul would then have 30 days to sign the bill, or it would be vetoed automatically if not signed by the end of that period.

The New York bill bans employers (regardless of form) from seeking or requiring a "covered individual" to enter into an agreement that prohibits or restricts the covered individual from obtaining employment following the individual's termination of service with the employer. A "covered individual" is any 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. This definition would appear to apply to partners and other service providers who are not in a traditional employment relationship, but the bill's reference to the service provider being in a position of "economic dependence" on the employer would suggest that independent contractors are excluded from its reach.

The bill also provides that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." This provision seems to give New York courts the authority to address those contracts that are entered into after enactment of the law but that may or may not be covered by the above prohibition.

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Perhaps most significantly, the bill authorizes affected covered individuals to bring a civil action against any employer or person alleged to have violated the prohibition. These individuals would have two years from the later of when:

- the prohibited non-compete was signed;
- the individual learns of the prohibited non-compete;
- the employment or contractual relationship is terminated, and
- the employer takes any action to enforce the non-compete agreement to bring a civil action.

The bill provides that if the affected covered individual succeeds in such a civil action, the individual has the right to recover his or her reasonable legal fees, lost compensation, and liquidated damages of up to \$10,000, which the court shall award to every affected covered individual. A court can also award injunctive relief.

The bill excepts:

- fixed term contracts, which is not defined in the bill, but is generally understood to mean those contracts where an employee is employed for a fixed period of years. These types of agreements are common in the entertainment industry, and the bill supersedes the current ban on New York non-competes for broadcast employees. However, it's unclear whether this exemption covers only true "fixed term" contracts or also captures those containing an evergreen or auto-renewal feature;
- non-disclosure agreements; and
- non-solicitation of client agreements, as long as the covered individual learned about the client during service. The bill does not address pre-service knowledge or employee non-solicits.

Notably, the bill does not retroactively affect non-competes entered into prior to its effective date. However, it is unclear whether its prohibition will extend to the auto-renewal of agreements containing non-competes or amendments to provisions of an agreement outside of a non-compete restriction.

Given these developments, New York employers should take stock of their non-compete agreements and consider other ways to restrict competitive activity if the ban takes effect. If you have any questions concerning the bill or how best to protect your company's interests, please feel free to reach out to your regular contacts at the firm.

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