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New York's Non-Compete Ban Awaits Governor's Approval

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In a major development for employers, New York is poised to ban employee non-competition agreements. Governor Kathy Hochul is currently considering a bill that was fast-tracked through the state legislature that voids "[e]very contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind." If signed, the bill will amend the New York Labor Law to prohibit New York employers from entering into a non-compete agreement with any individual who is in a position of "economic dependence on, and under an obligation to perform duties" for an employer. Governor Hochul previously expressed support for eliminating non-compete agreements for workers making below the median wage in New York, but the bill she is considering applies to all employees in New York irrespective of compensation. If approved by the Governor, the law will be effective 30 days later.

Below, we outline the noteworthy takeaways from this likely radical change to New York law.

1. **Broad Coverage.** The bill broadly defines "non-compete agreement" as "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."[1] The definition of "covered individual" is similarly broad, defining that term as "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."
2. **Limited Express Exceptions.** As drafted, the bill expressly states that it does not impact an employer's ability to enter into a "fixed-term of service" with any covered individual. It also states that employers may continue to enter into agreements that protect trade secrets, confidential and proprietary client information and prohibit solicitation of clients of the employer that the covered individual learned about during employment, "provided that such agreement does not otherwise restrict competition in violation of this section."
3. **No Retroactivity.** The bill only applies to non-compete agreements entered into on or after its effective date, which is 30 days after the Governor's approval.
4. **Private Right of Action.** Covered individuals would have a private cause of action against employers violating the law. Such individuals would be permitted to bring lawsuits seeking to void any non-compete that violates the law, obtain injunctive relief against enforcement of the non-compete, and recover for lost compensation, damages, and reasonable attorneys' fees and costs. The bill also provides that "the court shall award liquidated damages to every covered individual affected under this section." Liquidated damages are capped at $10,000.
5. **Two-Year Statute of Limitations.** The bill provides a two-year statute of limitations, but employers should be aware that litigation could arise long after

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entering into the offending agreement. This is because the two-year period runs from the latest of: (i) when the prohibited non-compete agreement was signed; (ii) when the covered individual learns of the prohibited non-compete agreement; (iii) when the employment or contractual relationship is terminated; or (iv) when the employer takes any step to enforce the non-compete agreement.

6. **Significant Unresolved Questions**. The bill is redundant in places and contains numerous ambiguities. For example, it does not address whether it applies to independent contractors or whether paid garden leave and equity forfeiture arrangements are permissible. The bill also does not define a "fixed term of service" agreement, and it is silent about the permissibility of post-employment agreements not to solicit or hire a former employer's employees. The bill also does not expressly address non-competition agreements arising from the sale of a business, which are common.

If enacted, this is undoubtedly a dramatic change for New York employers. New York will join several other states that have essentially banned post-employment non-compete agreements, including California, Minnesota, North Dakota, and Oklahoma. In recent years, other jurisdictions such as Colorado, Illinois, Maine, Maryland, Nevada, New Hampshire, Oregon, Rhode Island, Virginia, Washington, and Washington, D.C. have also limited the validity of non-compete provisions based on specific factors like compensation and employee classification. Additionally, there has been increased scrutiny on non-competes at the federal level with the Federal Trade Commission's proposed new rule seeking to ban non-compete clauses[2] and the National Labor Relations Board General Counsel's memorandum expressing her view that certain non-compete provisions in employment and severance agreements could violate the National Labor Relations Act.[3]

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[1] N.Y. A01278B § 191-d(a) (emphasis added), https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A01278&term=&Summary=Y&Actions=Y&Text=Y.

[2] *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition* (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

[3] *NLRB General Counsel Issues Memo on Non-competes Violating the National Labor Relations Act* (May 30, 2023), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-non-competes-violating-the-national.

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment practice group, or the following practice leaders and partners:

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