

New Bill Banning Noncompetes Could Soon Become Law in New York

June 23, 2023

Earlier this week, the New York State Legislature passed a bill that would broadly prohibit the use of new noncompetes with workers in New York State (the “Noncompete Bill” or the “Bill”).¹ The Bill would add a new provision of the New York Labor Law, section 191-d, prohibiting employers and their officers and agents from seeking, requiring, demanding or accepting a “noncompete agreement” from any “covered individual” after termination of employment. The Bill would also create a private right of action for individuals to bring a claim against an employer or individual who violates the bill’s provisions. Notably, the Bill would not invalidate existing noncompete agreements and would only be applicable to contracts entered into or modified on or after the effective date of the law.

The Bill is next headed to Governor Kathy Hochul for her review and signature. If signed by Governor Kathy Hochul, the ban would take effect 30 days after the governor signs it, and New York will join California and growing number of states that prohibit the use of noncompetes. The Noncompete Bill also follows on the heels of the recent U.S. Federal Trade Commission (“FTC”) proposed rule to ban noncompetes.²

KEY PROVISIONS OF THE NONCOMPETE BILL

Covered Noncompete Agreements

The Bill defines a “noncompete agreement” as an agreement that prohibits or restricts a covered individual from obtaining employment after the conclusion of employment with the employer. This would cover traditional noncompetes and may also cover other types of restrictive covenants that meet this definition, although the law does not specify what those other restrictive covenants would be. The Bill specifically provides that the law will not be construed to affect any other provisions of law relating to the ability of an employer to enter into agreements with workers that prohibit

¹ The Noncompete Bill quickly made its way through the State Legislature, where the Senate passed [Bill S3100](#) on June 7th, 2023, and the Assembly passed [Bill A1278A](#) shortly thereafter, on June 20th.

² Our [prior Client Update](#) includes more information about the FTC’s proposed rule to ban noncompetes.

(1) disclosure of trade secrets, (2) disclosure of confidential and proprietary client information or (3) solicitation of clients of the employer that the covered individual learned about during employment, in each case so long as the agreements do not otherwise violate the terms of the Bill. The Bill does not address agreements related to the solicitation of employees, but it appears such agreements are not prohibited under the Bill.

Covered Individuals

The Bill appears to cover noncompetes with most workers, including traditional employees, independent contractors, gig workers and those who perform work for another in an informal services arrangement, whether paid or unpaid. Specifically, the definition of a “covered individual” is a 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 odd standard appears to be an effort to capture service providers in all of their different forms regardless of level.

Enforcement

The Bill’s text creates a private right of action against employers by covered individuals to bring a claim against an employer or individual who violates the Bill’s provisions. The Bill has a two-year statute of limitations from the later of (i) when the prohibited noncompete was signed, (ii) when the covered individual learned of the prohibited noncompete, (iii) when the employment or contractual relationship is terminated or (iv) when the employer takes any step to enforce the noncompete. Under the Bill’s text, remedies against an employer include voiding a prohibited noncompete agreement and ordering all “appropriate relief,” including enjoining the conduct of the employer; ordering payment of liquidated damages of up to \$10,000; and awarding lost compensation, damages, reasonable attorneys’ fees and costs. “Lost compensation” is not defined but could possibly include compensation from another employer where a potential job opportunity was terminated or not pursued because of a prohibited noncompete.

Effective Date

The Noncompete Bill would become effective 30 days after being signed into law by Governor Hochul or after a vote by the Legislature to override a veto.

While it is yet to be seen whether Governor Hochul will sign the Bill, veto it or send it back to the legislature for modifications, Governor Hochul has publicly supported limitations on noncompete agreements, particularly for low-wage employees. Last year, she pledged to propose legislation to eliminate noncompetes for workers making below

the State's median wage. Even if Governor Hochul were to veto the Bill, there is a possibility that the current legislature could override her veto.

IMPACT ON SELLER NONCOMPETES

The New York Noncompete Bill does not specifically address noncompetes entered into in connection with the sale of a business. The definition of covered individual requires the performance of work or service and a position of economic dependence, so the Bill would not prohibit noncompetes with sellers who do not otherwise have an employment or other service relationship. There may be arguments that the Bill also does not prohibit noncompetes with individuals who are both service providers and holders of material equity interests in their employers, but the scope of permissible noncompetes with worker-sellers may end up being decided in litigation.

IMPACT ON NOTICE PROVISIONS, GARDEN LEAVE AND EMPLOYEE CHOICE DOCTRINE

The effect of the Noncompete Bill on notice provisions, garden leave and New York's "employee choice" doctrine is not clear. Under the employee choice doctrine, terminated employees can choose to comply with noncompete agreements and receive compensation and benefits or forfeit such compensation and benefits to compete with their former employer. We expect that if the Bill is passed, the impact on these types of commonly used contractual arrangements would be determined by the courts.

INTERACTION WITH THE PROPOSED FTC RULE

There is also the question of what happens next for the FTC's proposed nationwide ban on noncompetes. The FTC is not expected to vote on the proposed rule or any revised version of the proposed rule until April 2024. If enacted, the FTC's proposed rule would supersede any state statute, regulation, order or interpretation to the extent inconsistent with the FTC's final rule, including the New York Noncompete Bill. However, the FTC's Proposed Rule clarifies that a state law is not inconsistent with its rule (and will not be preempted) if it provides workers greater protection than the FTC's rule.

The New York Noncompete Bill differs from the FTC proposed rule in two material respects:

- The FTC's Proposed Rule would require the rescission of all existing noncompetes. In contrast, the New York Noncompete Bill would not have a retroactive effect and would only be applicable to contracts entered into or modified on or after the effective date of the law.
- The FTC's proposed rule would permit noncompetes with those worker-sellers who owned at least 25% of the business. The New York Noncompete Bill does not have a similar carveout.

NEXT STEPS FOR EMPLOYERS

Employers should continue to monitor legal developments in this area—not just in New York and at the FTC level but also in other states where business employees work. Although the New York Bill would not ban existing noncompetes that are not modified, employers should audit existing noncompetes to understand who is covered, where the employees are located and the nature and term of the restrictions in place. In the current environment, we continue to recommend that employers avoid entering into noncompete agreements with low-wage earners, even in those states where such noncompetes are permitted, without a compelling business reason for doing so. We also recommend that employers focus on enhancing trade secret protections beyond the use of noncompetes. For example, employers can take steps to ensure that they have in place effective and enforceable policies and nondisclosure and confidentiality agreements and invention assignment agreements.

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