

## **NEW YORK POISED TO BAN ALL NON-COMPETES**

Jun 22, 2023

A bill headed to Governor Kathy Hochul for signature or veto would ban all non-competition covenants (“non-competes”) in the State of New York. [Bill No. S3100A](#) (the “Bill”) passed the State Senate on June 7, 2023, and the State Assembly (substituting Bill No. A1278) on June 20, 2023.

### **BAN ON NON-COMPETES WITH EMPLOYEES AND OTHER SERVICE PROVIDERS**

- Under the Bill, employers are prohibited from seeking, requiring, demanding or otherwise accepting a non-compete from a “covered individual.”
- “Covered individual” is broadly defined as any person who performs work or services for another person on such terms and conditions that they are in a position of economic dependence on, and under an obligation to perform duties for, that other person (i.e. an employee or independent contractor). Notably, there is no compensation threshold above which employees may lawfully be bound by a non-compete.
- The Bill defines non-compete agreements 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.”

### **POSSIBLE BAN ON “SALE-OF-BUSINESS” NON-COMPETES**

- Whether or not intended by the Legislature, the Bill may also ban sale-of-business non-competes (i.e. those prohibiting the seller of a business from competing against the business that was sold).
- In addition to the ban on non-competes with service providers in Section 1 of the Bill, Section 3 of the Bill states: “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 language is identical to the operative text of Section 16600 of the California Business and Professions Code, which creates California’s complete ban on non-competes - but without the subsequent sections

(16601, 16602 and 16602.5) that create the exceptions for non-competes in connection with the sale of a business.

- It remains to be seen whether this provision will be interpreted (by the courts or the New York State Department of Labor) in a way that preserves sale-of-business non-competes in New York. The legislative history of the Bill may shed some light on this issue when it becomes available next year.

## **EXCEPTIONS**

- The Bill does not affect an employer's ability to enter into an agreement with a prospective or current covered individual that "prohibits disclosure of trade secrets, disclosure of confidential or proprietary client information, or solicitation of clients of the employer that the covered individual learned about during employment[.]"
- The Bill is silent on the issue of solicitation of employees. While it can be argued that the definition of a "non-compete agreement" does not include agreements not to solicit employees and therefore the Bill does not prohibit such agreements, courts in California have interpreted Section 16600 to ban such covenants, and the Bill contains identical language. Therefore, courts in New York may also conclude that employee non-solicitation covenants are banned.
- And although the Bill would permit a covenant against soliciting the employer's customers, it would apparently not permit a covenant against accepting business from customers.

## **EFFECTIVE DATE; EFFECT ON CURRENT AGREEMENTS**

- If the Governor signs the Bill, it will take effect on the thirtieth (30th) day thereafter.
- The Bill states that the law applies to "contracts entered into or modified on or after such effective date," indicating that the ban on non-competes will apply only prospectively. But employers should be aware that amendment of an agreement containing a non-compete may bring the non-compete under the new law.

## **CONSEQUENCES FOR VIOLATING THE LAW**

- Violators could face a civil action so long as the covered individual brings such action within two (2) years of the later of:
  - When the prohibited non-compete agreement was signed;
  - When the covered individuals learned of the prohibited non-compete agreement;
  - When the employment or contractual relationship terminated; or

- When the employer took any steps to enforce the prohibited non-compete agreement.
- Under the Bill, the court **shall** award liquidated damages (up to \$10,000) to every covered individual affected under this section, in addition to any other remedies permitted by this section (enjoining the conduct, lost compensation, damages, reasonable attorneys' fees and costs), against employers who are found liable for violating the Bill.

## NEXT STEPS

- Given that the law would go into effect thirty days after the Governor signs the Bill, employers should begin to review their employment agreements, independent contractor agreements and other contracts that contain non-competes or other restrictive covenants that may be impacted by the Bill.
- Employers who routinely amend employment agreements containing non-competition provisions for existing employees may want to consider revising those agreements before the effective date of the new law to carve out the restrictions and put them in a separate standalone agreement that will not be amended over time.
- If the Governor should decide to veto the Bill, the State Senate would need to flip 2 votes from No to Yes, while the State Assembly would need to flip 5 votes, in order to override that veto.

*Bryan Cave Leighton Paisner LLP has a team of knowledgeable employment lawyers and other professionals. If you or your organization would like more information on this or any other employment issue, please contact any attorney in our [New York City office](#) or the [Employment and Labor practice group](#).*

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