

ALERTS

New York on the Brink of Banning Non-Competes

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New York State may be on the verge of joining California, North Dakota, Oklahoma and Minnesota in banning the use of non-competes. Both houses of the New York State Legislature have passed the identical bill^[1] that would prohibit all non-compete restrictions on employees and certain other service providers and allow them to recover civil damages from their employers who impermissibly impose such restrictions. The bill will be sent to New York State Governor Kathy Hochul for review prior to the end of 2023. If not vetoed by Gov. Hochul, the ban will take effect 30 days after the bill becomes law and will apply to all non-competes in any agreement entered into or modified on or after the effective date.

The timing of the bill being delivered from the Legislature to Gov. Hochul is unclear. We understand that the Governor's office has not taken a position on this bill.^[2] Business groups are expected to lobby Gov. Hochul to veto the bill or, failing that, negotiate a "chapter amendment" that contains a salary threshold, a sale of business exception and/or clarifies certain issues left unclear in the bill.^[3]

The bill prohibits an employer from entering into a "non-compete agreement" with any "covered individual." The bill defines a "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." "Covered individual" is defined 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.” Though it is unclear what it means for a person to be “in a position of economic dependence on,” it appears the bill’s restrictions apply to employees, partners, and certain independent contractors.

The bill would provide an individual with a private right of action against any employer that required or demanded the individual enter into a non-compete agreement. An individual whose rights under the bill are violated may be provided injunctive relief and compensatory damages, including lost compensation and attorneys’ fees and costs. The bill also provides that a court will award liquidated damages to each such individual in an amount not to exceed \$10,000.

The bill does not prohibit contracts that “establish[] a fixed term of service or prohibit[] disclosure of trade secrets, disclosure of confidential and proprietary client information, or solicitation of clients of the employer that the individual learned about during employment, provided that such agreement does not otherwise restrict competition in violation of [the law].” It is not clear what provisions would be viewed as “restrict[ing] competition,” and what the bill’s effect will be on certain non-solicitation provisions.

Unlike the laws in California, North Dakota, Oklahoma and Minnesota, the New York State bill does not contain an exemption for non-competes entered into in connection with the sale of a business.

We will advise you of future developments. In the meantime, we are continuing to review the potential new law, including reviewing possible designs in compensation arrangements that would comply with the potential new law while meeting the goals of New York businesses and addressing its impact on New York businesses with non-New York employees and non-New York businesses with New York employees.

In anticipation of some variation of the bill becoming law, employers should consider whether they have existing express or implied compensation programs that contain non-competition restrictions. Because each employer’s actions will necessarily be different based on their own policies and practices, employers should contact their attorney to discuss what steps to take in response to the potential law.

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If you have any questions concerning this Alert, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] <https://www.nysenate.gov/legislation/bills/2023/s3100/amendment/a>

[2] The Governor has in the past expressed support for a ban on non-compete agreements for workers making below the New York State median wage. See <https://www.governor.ny.gov/news/governor-hochul-announces-comprehensive-plan-strengthen-new-yorks-workforce-and-help-grow>

[3] A “chapter amendment” is an agreement between the Governor and legislative leaders on changes to a bill being signed into law by the Governor. The Governor outlines the agreed upon changes in an approval message when signing the bill and the amendments are then adopted by the legislature.

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