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Client Alert Employment and Labor

New York on the Brink of Banning Non-Compete Agreements

The New York State legislature has passed a bill to broadly ban non-compete agreements in the State of New York, which is currently awaiting Governor Hochul's signature. While it is not known whether Governor Hochul will sign this particular version of the bill, in her 2022 State of the State address, Governor Hochul pledged to outlaw non-compete agreements for workers earning below the State median wage and to explicitly ban all "no poach" agreements under New York State antitrust law. However, the bill which the legislature passed is far broader than that, in that it bans non-compete agreements for all workers, regardless of compensation or position.

If bill S3100-A ("the bill" or "proposed non-compete ban") is enacted, New York would join a growing movement to limit or ban non-compete agreements. Among recent developments, the Federal Trade Commission has proposed a rule change that would ban non-competes based on its preliminary finding that non-competes constitute an unfair method of competition. In addition, the National Labor Relations Board's General Counsel issued a Memorandum finding that non-compete agreements interfere with employees' exercise of rights under Section 7 of the National Labor Relations Act.

The bill does not impact agreements prohibiting the disclosure of trade secrets, confidential and proprietary information, as well as agreements restricting solicitation of clients of the employer that the employee/worker learned about during employment. However, as discussed below, one line of the bill casts some doubt on the scope of the bill. The following is a summary of New York's proposed non-compete ban.

Proposed Non-Compete Agreement Ban

New York's proposed non-compete ban would amend the New York State Labor Law to add a new Section 191-d that would void "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind." The bill broadly

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prohibits employers (or their agents), or the officers or agents of any corporation, partnership, limited liability company, or other entity from seeking, requiring, demanding, or accepting "a non-compete agreement" from any "covered individual."

Under the bill, a "covered individual" means 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 such other person, economically dependent upon, and under an obligation to perform duties for, that other person. More simply stated, this language makes the proposed non-compete ban applicable to a broad swath of workers – and well beyond the low-wage workers whom Governor Hochul referenced. Although a specific reference to "independent contractors" was deleted from a prior version of the bill, the legislative history reflects that this deletion was intended to broaden the scope of coverage and therefore, it appears that independent contractors would be covered by this definition.

The definition of a "non-compete agreement" is also broad. 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…."

Exceptions

The bill contains language stating that the ban shall not be "*construed or interpreted as affecting any other provision of federal, state, or local law, rule, or regulation relating to the ability of an employer to enter into an agreement with a prospective or current covered individual that establishes a fixed term of service or prohibits disclosure of trade secrets, disclosure of confidential and proprietary client information, or 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***." Given that the preceding bolded language is rather vague, the potential impact of the bill on these other types of agreements remains unclear. The bill in its current form does not include any exclusion or exception for non-competes as part of a sale of a business. Further, there is no mention in the bill of provisions restricting employees from soliciting other employees (employee non-solicitation provisions).

Remedies

The bill allows covered individuals to sue their violators civilly. It empowers courts to void non-compete agreements, to enjoin employers from enforcing non-compete agreements, and to award lost compensation, as well as other damages, reasonable attorney's fees, and costs. In addition, the bill specifically provides that courts "*shall* award liquidated damages to every covered individual affected under this section, in

addition to any other remedies." Liquidated damages are to be calculated as an amount not more than $10,000.

A covered individual can bring suit within two years of the later 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.

Impact on Existing Agreements

The bill includes language that the law "shall be applicable to contracts entered into or modified on or after" the legislation becomes effective – thirty (30) days after Governor Hochul signs it into law. As it stands currently, this language supports that existing agreements will not be impacted, unless preexisting agreements are modified after the law becomes effective.

Notably however, the proposed new law's impact on current agreements may incur debate upon enactment due to the bill's arguably conflicting language stating 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," coupled with the New York State Assembly's Memorandum in Support of Legislation touting the invalidation of current agreements.[1] Accordingly, if passed into law, this may be an issue to watch.

Takeaways

New York is poised to join the national trend limiting or banning non-compete agreements. If enacted, employers in the State must review their practices and ensure that they comply with the new law, including when modifying an agreement containing an existing restrictive covenant. Since the current version of the bill appears to be prospective only, New York employers currently considering modifying or imposing non-compete agreements may want to move swiftly. In view of the proposed law, companies should take proactive steps to counter unfair competition should an employee leave and join a competitor, such as protecting their trade secrets and sensitive information both during the period of employment, as well as during the off-boarding process.

[1] Specifically, the New York State Assembly issued a "Memorandum in Support of Legislation" which accompanied the Assembly's version of the bill and provided in part: "The bill would *void current non-compete agreements* and prohibit employers from seeking such agreements …" (emphasis added). Thereafter, the Assembly's version of the bill was replaced by the Senate's version, which is currently pending Governor Hochul's signature. In contrast, the New York State Senate "Introducer's Memorandum in Support of S3100-A," which accompanied the current bill, does not include the reference to voiding current non-compete agreements and rather provides that "Subsection 3: *Voids non-compete agreements entered into after the effective date* and prohibits employers from seeking such agreement." (emphasis added).

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Our Sills Cummis Employment and Labor Practice Group attorneys are available to advise on these evolving issues and potential solutions.

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