New York Lawmakers Say "No" to Non-Competes: 3 Things You Need to Know About Non-Compete Ban Heading to Governor's Desk

Insights
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New York lawmakers just passed legislation that would ban employee non-compete agreements, heading to Governor Hochul for consideration. If signed into effect by the governor, the law will be a sea change for New York employers, who have historically been able to enter into reasonable non-compete agreements with their workers. With this legislation passed on June 20, New York is the latest jurisdiction to push back on restrictive covenants, joining California, Minnesota, North Dakota, and Oklahoma – all of which have also banned the use of non-compete agreements. New York's bill is also in line with the position recently taken by the General Counsel of the NLRB, as well as the Federal Trade Commission's recent proposal to implement a rule banning the use of non-competes. Here are the three key things you need to know about the New York statute – and what employers should be doing about it. **[Editor's Note: Governor Hochul vetoed this proposed law on December 22, 2023.]**

1. Bill Contains a Broad Ban on Non-Competes

First and foremost, the new law would render unlawful any non-compete agreement entered into or modified on or after the effective date of the law, which will be 30 days after being signed by the governor. This means that existing non-competes would remain enforceable, but employers would not be able to enter into new agreements going forward or modify existing ones without running afoul of the law.

The statute defines "non-compete agreement" as any agreement, or clause contained in any agreement, that prohibits or restricts a worker from obtaining employment after the conclusion of employment with the employer included as a party to the agreement. Both employees and independent contractors will be covered under the statute, if the independent contractor is in a position of economic dependence on the employer.

2. There are Some Exceptions – But No Business Sale Exception

The bill excludes certain other restrictive covenants from its coverage.

- Specifically, agreements that prohibit **disclosure of trade secrets, confidential or proprietary information** would still be permitted.

- Also permitted: **client non-solicitation agreements**, so long as they only prohibit solicitation of clients of the employer that the worker learned about during employment.
- The bill does not specifically mention agreements **banning solicitation of other employees**, which presumably would remain permissible.

But the bill does not contain an exception for non-competes entered in the sale of business context, unlike the other existing states that ban non-compete agreements.

3. Workers Could Bring Private Actions for Violations

Employees and contractors would have the right to sue in court for any violations of the law. Any such action would need to be commenced within two years of the later of:

- the date the unlawful non-compete was signed;
- when the individual learns of the unlawful non-compete;
- the date the employment or contractual relationship ends; or
- when the employer takes steps to try to enforce the non-compete agreement.

An aggrieved worker would be entitled to "all appropriate relief," including injunctive relief, lost compensation, attorneys' fees and liquidated damages up to $10,000.

What You Should Do Now

If your organization uses non-compete agreements, you must pay close attention to this development. You should be prepared for the possibility that you will not be able to use these agreements in New York in short order. You should immediately look over both your employee and independent contractor agreements to determine whether they contain non-compete provisions. Once identified, it could be helpful to create a catalogue of those documents, with location, version, and employee key attributes to ease transition to compliant documents.

You should consider whether you can protect your company's interests with a less burdensome restriction, geared only towards protecting disclosure of sensitive information and prohibiting customer non-solicitation. Review your other forms of restrictive covenants that will be permitted under New York law (e.g., customer non-solicitation, employee non-recruiting, confidentiality, trade secret non-disclosure) to ensure they are robust and provide you with sufficient and appropriate protections for the particular circumstance (nature of the position, protectible interests, protected information).

Additionally, you must understand the interplay between the New York statute and federal efforts to restrict non-compete agreements. The NLRB General Counsel has promoted the position that many non-compete agreements violate federal labor law, and the Federal Trade Commission has proposed a rule that would formally ban most non-compete agreements, including already existing

proposed a rule that would formally ban most non-compete agreements, including already existing agreements. That federal proposed rule has been delayed until at least April 2024, after receiving nearly 27,000 public comments. You should continue to monitor developments at the federal level to determine the impact of federal rulemaking and guidance, in addition to state-specific non-compete bans.

Conclusion

We will continue to monitor developments and provide updates, so make sure you are subscribed to Fisher Phillips' Insight System to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our New York City office or member of our Employee Defection and Trade Secrets Practice Group.

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