NYC Lawmakers Consider Broad Non-Compete Ban: What Businesses Need to Know

Insights
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After a failed attempt to ban non-compete agreements statewide last year, New York City legislators are now poised to take matters into their own hands. Just weeks ago, the New York City Council unveiled a trio of proposed bills that would drastically alter the landscape of non-competes for employers in the Big Apple. Historically, employers in NYC have been able to enter reasonable non-compete agreements with their workers — but that could change if any of these measures are successful. Here's an overview of the proposed laws and their potential impact on employers.

Ban on All Non-Compete Agreements

- The most far-reaching among the proposed bills, 0140-2024, aims to impose a broad ban on non-competes for both employees and independent contractors.
- Under this bill, a non-compete agreement is defined as "an agreement between an employer and a worker that prevents, or effectively prevents, the worker from seeking or accepting work for a different employer, or from operating a business, after the worker no longer works for the employer."
- Employers would be barred from entering into such agreements with any workers, and all existing agreements would need to be rescinded by the effective date. In other words, the law would have retroactive effect.
- The proposed bill does not include a private right for workers to sue for violations. However, any non-compete entered into or maintained in violation of the law would be deemed unenforceable, with violators subject to a civil penalty of $500 per violation.
- This proposed ban on non-competes is sweeping in scope. Notably, the bill does not reference customer non-solicitation agreements or confidentiality provisions, unlike many other state laws prohibiting or restricting the use of non-compete agreements.
- Unlike legislation in other states, there is also no exception for non-competes entered in connection with the sale of a business. Moreover, this bill does not allow non-competes above a certain income level, which is the issue that reportedly caused Governor Hochul to veto the statewide ban.
- If this bill is successful, NYC would be the first city to broadly ban non-competes, joining states like California, Minnesota, Nebraska, North Dakota, and Oklahoma.

Ban on Non-Competes for Low-Wage Workers

- An alternate measure, 0146-2024, aims to prohibit non-compete agreements for "low-wage employees."
- Under this proposal, a "non-compete agreement" refers to any agreement that limits an employee's ability to work for a different employer for a specified duration of time or in a specified geographic region or to engage in similar work for a different employer compared to what they did for their employer.
- The bill adopts the definition of "clerical and other worker" found in New York Labor Law 190 to define "low-wage employee." Consequently, this ban would cover all employees except: manual workers (somewhat oddly); railroad workers; commission salespeople; or bona fide executive, administrative, or professional employees earning over $1,300 per week (equivalent to $67,600 per year).
- Like the first proposal, this law would ban non-compete agreements for low-wage employees, although it does not appear to invalidate any existing agreements.
- Additionally, this bill would require employers to disclose in writing at the outset of the hiring process any requirement for workers who are not classified as low-wage employees to enter non-compete agreements.
- Enforcement would be left to the NYC Office of Labor Policy & Standards, and there is no private right of action contemplated for violations.

Ban on Non-Competes for Freelance Workers

- The final proposal, 0375-2024, contemplates a ban on non-competes for freelance workers. This legislation would bar any agreements that restrict a freelance worker from engaging in similar work for other parties unless the hiring party pays the freelancer a "reasonable and mutually agreed upon sum" on a bi-weekly or monthly basis for the duration of the non-compete period.
- The bill would cover agreements restricting freelance workers' ability to perform work similar to what they did for the hiring party, for either a specified time period or within a certain geographical area.
- The term "freelance worker" is broadly defined as any individual (or organization composed of no more than one person) hired or retained as an independent contractor to provide services to the hiring party in exchange for compensation. Excluded from this definition are sales representatives, lawyers, doctors, and members of FINRA.
- In contrast to the other two proposals, this bill contemplates a private right of action for violations — meaning that freelancers who believe their rights have been violated can pursue legal action to void the non-compete — along with statutory damages of $1,000.
- Additionally, the prevailing party may also be awarded reasonable attorneys' fees.

- Violators also face civil penalties of $500 per violation and repeat violators may be subject to a lawsuit for a pattern or practice of violations, with a civil penalty of up to $25,000.

What Does This Mean For Your Business?

- At this point, the fate of these bills is unclear. If successfully enacted, however, they would each take effect 120 days after they become law and would create a sea-change for businesses in New York City.
- If your organization uses non-compete agreements, you should closely monitor developments, as the proposed New York City legislation is not the only avenue for potential restrictions on such agreements.
- As we previously reported, New York State lawmakers passed legislation last year that would have banned employee non-compete agreements statewide, which was vetoed by Governor Hochul shortly before the new year. Reportedly, Governor Hochul wanted the law to include a salary cap so employers could enter non-competes only with their highest paid executives. The lack of a wage limit and exclusions to the ban were apparently fatal to the statewide proposal. NYC's broadest proposal is similarly lacking, which may present obstacles to enactment.
- While the Governor and state legislature were not able to reach an agreement on a salary cap, lawmakers have indicated their intent to continue efforts to enact legislation restricting non-competes statewide.
- Further, the National Labor Relations Board's General Counsel has promoted her view that many non-compete agreements violate federal labor law.
- Additionally, the Federal Trade Commission has proposed a rule that would formally ban most non-compete agreements, including existing agreements. That federal proposed rule has been delayed until at least April 2024, after receiving nearly 27,000 public comments.
- You should be on the lookout for more activity at the federal, state, and local level to determine the impact on your practices.

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, any attorney in our New York City office, or any member of our Employee Defection and Trade Secrets Practice Group.

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