Employer Update

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Will New York Enact Nation's Most Sweeping Non-Compete Ban?

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New York Governor Kathy Hochul previously advocated for a ban on non-competes for "low wage workers," meaning those earning less than New York State's median wage. But thanks to the New York legislature passing a bill banning most non-compete agreements, Governor Hochul now has a far broader law to consider. Specifically, the proposed law would place New York among California, North Dakota, Oklahoma, and Minnesota (effective July 1, 2023), as the only states in the country to ban employee non-compete agreements. New York's proposed law also raises many questions, including whether it would apply in the context of the sale of a business (which would be far broader than California and even the FTC's proposed rule to ban non-competes (see our prior alert on the FTC proposed rule)), or clauses tied to economic incentives (such as severance installments or forfeiture of equity provisions). The current iteration of the law also contains ambiguous language allowing, but limiting the scope of, customer non-solicitation provisions.

A summary of the key provisions of the proposed law, in its current form, is below. Weil will continue to monitor for developments and remains available to discuss the current state of the law and strategize with you about how this proposed law may impact your business, including the protection of confidential information, trade secrets, and customer goodwill.

The Proposed Law's Coverage

Broadly, the proposed law has two similar but conceptually distinct rules that would become New York Labor Law Section 191-d.

First, it would prohibit employers from "seek[ing], requir[ing], demand[ing] or accept[ing] a non-compete agreement from **any covered individual**." Under the proposed law, a "non-compete agreement" is defined broadly as to include any agreement with a "covered individual" that restricts such covered individual from obtaining employment after the covered individual separates from the employer. While the definition of a "covered individual" covers virtually all employees, it would also likely include those who typically are not viewed as "employees," such as partners in a partnership, provided that such partners actually perform services for the employer.

The proposed law includes a private right of action allowing covered individuals to sue any employer who seeks, requires, demands, or accepts a non-compete agreement from them. A court could then void the non-compete agreement *and* "order all appropriate relief," including injunctions stopping an employer from engaging in the unlawful conduct. The court could also issue monetary relief including payment for lost compensation, damages, and attorneys' fees and costs. The law also indicates that a court "shall" award liquidated damages to every aggrieved covered individual. The maximum liquidated damages is $10,000.00, but the proposed law appears to leave the exact calculation to the discretion of the courts.

Second, the law voids any contract provision to the extent that it restrains *anyone* from engaging in a lawful profession, trade, or business of any kind. This part of the law appears to apply to individuals with whom an employer may want to enter into a non-compete agreement who are not employees or contractors, such as, among others, non-employee sellers of a business, former employees, and contractors. Unlike the restrictions on entering into non-compete agreements with covered individuals, this portion of the law provides no private right of action. Rather, the law would merely void such a contract to the extent it restrains an individual from engaging in a lawful profession, trade, or business.

Exceptions, or Lack Thereof

Unlike California's ban (or any other state's ban), the New York ban includes no explicit exceptions for non-compete agreements restricting the seller of a business, partners exiting a partnership, or members exiting an LLC. In this regard, if signed into law, New York's proposed ban would be the most sweeping in the nation. In fact, the proposed law would be even broader than the FTC's proposed ban on non-competes, which does have a limited sale of business exception.

The law does, however, expressly exempt the following from its coverage:

- *Fixed-term contracts.* The law does not define a fixed-term contract. A fixed-term contract usually refers to a personal service contract whereby the employee—instead of being an "at-will" employee—agrees to work for the employer for a set period of time. It is an open question whether the law would permit employers to place employees on a paid, non-working "garden leave" during the term of the contract through the end of the contract's term.
- *Non-Disclosure Agreements*. The law does not cover agreements with covered individuals prohibiting disclosure of trade secrets and prohibiting disclosure of confidential and proprietary information.
- *Limited Customer Non-Solicitation Agreements*. The law exempts from coverage agreements prohibiting a covered individual from soliciting clients that the covered individual "learned about" during employment.

All of these exceptions are subject to the proviso that if they are drafted so broadly that they restrain the covered individual from engaging in a lawful profession, trade, or business, then the restriction is void and remedies discussed above may be available.

Effective Date

If signed, the law would take effect 30 days after Governor Hochul's signature. Providing some relief to employers, it will likely be applicable only to contracts entered into or modified after the effective date.

Open Questions

The law does not provide answers to many questions that are relevant to the enforcement of restrictive covenants generally, including the following:

- Can an employer place an employee with a fixed-term contract on a paid, non-working "garden leave" during the term of the contract through the end of the contract?
- Are economic incentive clauses tied to non-competition, such as forfeiture-for-competition provisions, allowed? Under a typical forfeiture-for-competition provision, a restricted party agrees that if they compete with their former employer, they give up the right to some payment or benefit, typically in the form of cash or equity.

- Can buyers of a business subject non-employee sellers to non-compete agreements?
- Are clauses tied to employee non-solicitation impacted by the proposed law?

Governor Hochul is likely to be confronted with these and other questions by business interest groups as she considers whether to sign this bill.

Other Legislation on the Horizon

The New York State Senate also passed a bill (S6748) that would largely mirror the Federal Trade Commission's ban on non-competes. It has not yet been passed by the New York State Assembly, and would conflict with the non-compete ban currently on Governor Hochul's desk in many ways. This bill would declare it an unfair method of competition for employers to enter into, maintain, or represent that a worker is subject to a non-compete clause. Like the FTC rule, it would also require the rescission of any prohibited non-compete clauses currently in effect. This would appear effectively to moot the proposed Section 191-d of the New York Labor Law's solely prospective effect.

S6748 contains a sale of business exception that would, like the FTC's proposed ban, allow entering into a non-compete with those who sell all or substantially all of their ownership interest in a business entity so long as they are owners of at least 25% of the business entity. Section 191-d of the New York Labor Law would seem to moot S6748's sale of business exception at least as it applies to individuals who provide services for the entity because it contains no sale of business exception.

Employer Update is published by the Employment Litigation practice group of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

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