

CLIENT ALERT

New York State Legislature Bans Non-Compete Agreements; Bill Awaits Governor's Signature

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On June 20, 2023, in a special legislative session, the New York State Assembly approved [bill number S3110A](#) (the "Bill"), which the State Senate passed on June 7, that would amend the New York Labor Law to make unlawful non-compete agreements signed or modified after the law's effective date. The Bill does not retroactively invalidate non-compete agreements. Governor Kathy Hochul has 30 days to sign the Bill. If signed, the Bill would take effect 30 days later.

The Bill creates a new section of the Labor Law, Section 191-d, titled "Non-compete agreements." The Bill defines "non-compete agreements" to be "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." A "covered individual" means "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 the other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person." The Bill has a carve-out that permits employers to enter into restrictive covenants with covered individuals that prohibit (i) the disclosure of trade secrets, confidential and proprietary client information; or (ii) the solicitation of clients of the employer that the covered individual learned about during employment, provided that such restrictive covenants do not "otherwise restrict competition in violation of this section."

Although the Bill defines "non-compete agreements" in the context of relationships between employers and covered individuals, it also notably declares, "[e]very contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." This language suggests that the non-compete ban is broader than agreements entered into between employers and covered individuals, and would cover non-competes in other contexts,

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such as the sale of a business. Significantly, unlike [non-compete prohibitions in California](#) and the Federal Trade Commission's ("FTC") [proposed non-compete ban](#) (discussed in a [prior Willkie client alert](#)), the Bill does not have an express carve-out for non-competes imposed on individuals selling their interest in a business. The Bill also is notably different from the FTC proposed non-compete ban because it does not require the rescission of existing non-compete agreements nor require employers notify individuals subject to non-compete agreements that such agreements have been voided.

The Bill creates a private right for covered individuals to bring a civil action in a court of competent jurisdiction against any employer or persons alleged to have violated this section within two years of the later of (i) when the non-compete agreement was signed; (ii) when the employee or contractor learns of the non-compete; (iii) when the employment or contractual relationship ends; or (iv) when the employer takes steps to enforce a non-compete provision. Courts are authorized to void any non-compete agreement which violates the statute and order any other appropriate relief, including enjoining the alleged unlawful conduct of any person or employer, and awarding the impacted covered individual (a) mandatory liquidated damages of up to \$10,000; (b) lost compensation; (c) damages; and (d) attorneys' fees and costs.

If signed into law, ambiguities in the Bill will likely be the subject of litigation, including:

- What is the scope of the non-compete ban? While the definition of "non-compete" in Section 1 of the Bill and the description of the private right of action created in Section 4 of the Bill define the prohibited agreements in the employment context, Section 3 of the Bill declares "every contract by which anyone is restrained from engaging in a lawful professions, trade, or business[.]" Accordingly, it is possible that the Bill may cover other business non-competes that have the effect of impeding someone from engaging in a lawful profession, trade, or business.
- Does the Bill prohibit currently lawful post-employment forfeiture for competition provisions which allow an employee to choose not to compete in order to receive a certain post-employment benefit, such as stock options or incentive compensation?
- When is a contractor considered "in a position of economic dependence on" such that the contractor becomes a "covered individual" under the Bill?
- What is the scope of the "damages" an employee or contractor may seek for a violation of the Bill?
- When is an existing contract "modified" such that an enforceable non-compete agreement becomes void under the Bill?
- Does the Bill prohibit New York employers from entering into non-compete agreements with employees working in other states?

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- If an employee working in a state where non-competes are permitted moves to New York, does the non-compete become unenforceable if it was entered into after the effective date of the Bill?

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