Employment & Labor Law Alert

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Yet Unsigned New York Bill Provides Potentially Sweeping Ban on Non-Compete Agreements

The New York State Legislature has passed what could be a significant change to New York law regarding non-compete agreements. On June 21, the New York State Assembly passed a bill banning most non-competes governed by New York law; the New York State Senate passed an identical version earlier this month. Gov. Kathy Hochul has 30 days to sign or veto the bill once it is delivered to her. A third option, a so-called pocket veto, in which Gov. Hochul takes no action on the bill, would effectively veto the bill because the legislature is not in session.

The bill bans 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." "Covered individuals" are defined to include "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 that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person."

The bill would apply not only to agreements with employees but potentially also to agreements with independent contractors to the extent they are economically dependent on the entity engaging them. The bill also would apply to covered individuals regardless of the amount of compensation they receive, making it much broader than laws in several states that have prohibited non-compete agreements with low-wage workers. The bill would also apply broadly to any type of agreement containing this kind of restriction, including employment agreements, retention agreements, bonus and equity awards, and certain transaction agreements (such as in the context of the sale of a business).

The prohibition would only apply to agreements modified or entered into after the effective date of the law. The bill also explicitly carves out (i) agreements for a fixed term of service, (ii) agreements that prohibit disclosure of trade secrets or confidential or proprietary client information, and (iii) agreements that prohibit solicitation of clients of the employer that the covered individual learned about during employment, "provided that such agreement[s] [do] not otherwise restrict[]competition in violation of this section." Therefore, certain nondisclosure and non-solicitation of client restrictions are likely to survive even if the bill is signed.

The bill does not address employee non-solicitation restrictions. Nor does it contain a "sale of business" exception (which even California's ban on non-compete agreements contains). The bill also does not address whether it applies to provisions that do not prohibit competition but rather impose a forfeiture of some payment or benefit in the event of competition (these provisions have historically not been analyzed under

New York law as non-compete provisions under the "employee choice doctrine"). These ambiguities could lead Gov. Hochul to veto (or pocket veto) the bill, or to require that certain amendments be made in the next legislative session to clarify the intended scope of the bill. Clarifications could also come in the form of regulations published after the bill is signed into law.

The bill provides a private right of action to covered individuals, who must bring an action 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." Courts are authorized to void any covered agreement and to order "all appropriate relief," which can include liquidated damages of not more than $10,000. The bill states that a court "shall award liquidated damages to every covered individual affected under this section," which suggests (somewhat oddly) that an award of liquidated damages may be mandatory.

The bill is part of a growing national trend against non-compete restrictions, including a pending Federal Trade Commission rule that would ban nearly all non-compete agreements, recent guidance from the National Labor Relations Board asserting that non-compete agreements may be viewed as a violation of employees' National Labor Relations Act rights, and a growing number of laws in other states that have imposed some type of limitation on non-competes. Even if Gov. Hochul does not sign the bill into New York law, employers should carefully assess the scope of their current restrictive covenant agreements and consider what restrictions are most crucial to protecting their legitimate business interests. Employers may choose to focus on drafting narrowly tailored nondisclosure and client and employee non-solicitation/non-interference agreements, which remain enforceable in most jurisdictions.

Related Professionals

Lauren Richards . . . . . lrichards@loeb.com
Mark Goldberg . . . . . mgoldberg@loeb.com

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