June 13, 2023

Updated: New York Legislature Passes Noncompete Ban

UPDATE (12/29/23): On December 22, Gov. Hochul vetoed the bill calling for modifications to the proposed legislation that would provide protections for middle-class and low-wage workers, while still protecting employers' legitimate business interests.

UPDATE (06/21/23): On June 20, the New York State Assembly passed A1278B, which is identical to S3100A that the Senate passed on June 7. Now that the legislature has passed the bill, it is heading to Gov. Hochul for her review. If she signs the bill into law, it will become effective 30 days after its signing, and noncompete agreements will be virtually prohibited in New York.

Following the Federal Trade Commission's (FTC) proposed nationwide ban of noncompete agreements and other initiatives at the state level to ban or restrict the enforceability of noncompetes, the New York legislature appears poised to follow suit. On June 7, the Senate approved S3100A, a bill that generally prohibits New York employers from using noncompetes. This Senate bill and an identical Assembly bill, A1278B, were introduced in January 2023 and gained traction in late May, leading up to the last week of the legislative session. Although the Assembly was scheduled to consider the noncompete ban on its agenda, it was not heard before the conclusion of the legislative session last week but may be considered if legislators return in the coming weeks. Here are some of the key takeaways of S3100A that would impact the use of noncompetes.

Unlike laws in other states that have taken action to curb the use of what are sometimes perceived as abusive noncompetes that target low-wage workers, the New York bill would prohibit employers from "seek[ing], requir[ing], demand[ing], or accept[ing] a non-compete with any covered individual," regardless of their position. "Covered individuals" include employees and others who perform work or services such that they are in a "position of economic dependence on" or have an obligation to perform services for that person or entity.

While the definition appears to be broad enough to apply to nonemployees (such as contractors), the bill's definition of "non-compete agreement" focuses on the employment relationship by referring to an agreement between "an employer and a covered individual" that restricts them from obtaining employment "after the conclusion of the employment relationship." Thus, the scope of the bill, in its current form, is somewhat unclear.

While the bill clearly bans new noncompetes in the employment context, in an apparent nod to a similar law in California, the bill includes broader language—"[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"—that seemingly attacks existing noncompetes. In fact, the summary of provisions from the Senate indicates that one of the subsections is intended to "void current non-compete agreements and prohibit employers from seeking such agreement."

If passed, the bill would amend New York Labor Law Section 191. The amendment includes a private right of action for all covered individuals that would allow them to seek injunctive relief and damages, including liquidated damages up to $10,000 and lost compensation, along with attorneys' fees and costs. Notably, the bill indicates that it applies only to contracts "entered into or modified on or after" the effective date of the bill (assuming it passes). It is possible this is intended to strike a

balance between saving employers from being subject to lawsuits based on noncompetes entered into before the bill was passed and what appears to be the overarching goal of the bill: to extinguish the use of noncompetes (at least in the employment context and potentially beyond that).

Despite these sweeping prohibitions regarding noncompetes, the bill does not appear to be intended to strip employers of all protections. The bill purports to permit certain agreements protecting trade secrets and confidential and proprietary information as well as nonsolicitation of clients that the covered individual "learned about during employment." This carveout, however, leaves open the possibility that even these types of provisions are unlawful if they otherwise restrict competition in violation of this bill. The ambiguity as to whether a facially permissible prohibition against soliciting customers of the former employer whom the covered individual "learned about during employment" might in fact be unlawful if it otherwise "restrict competition in violation of the bill" leaves many questions unanswered for New York businesses.

The Sponsor's Memo for S3100A argues that noncompetes have a negative impact on the labor market and on the New York state economy. The memo, in part, justifies the bill by referring to the recent FTC proposed rule (that we previously discussed here) that, if passed, would ban noncompetes. Given all the challenges to the proposed FTC rule, this justification seems questionable. Notably, the New York bill fails to expressly address noncompetes in the sale-of-business context and whether it is intended to regulate just New York businesses or pertains to employees who may work or reside in New York but do not work for businesses located in New York.

Bottom Line

If passed by the Assembly and signed by the Gov. Hochul, this legislation would have significant repercussions for New York businesses that rely on noncompetes to protect their legitimate business interests. Although the legislative session technically ended last week, it has been reported that legislators may return to Albany to consider remaining bills on the agenda. We will continue to monitor this legislation closely. In the meantime, employers should ensure that the contractual obligations they have with employees to prevent disclosure of confidential and proprietary information and improper client solicitation are drafted in a manner that would not be deemed to restrict competition in violation of the bill.

Authors

Trisha Efiom

Associate

Parsippany, NJ | (973) 966-8021

tefiom@daypitney.com

Heather Weine Brochin

Partner

Parsippany, NJ | (973) 966-8199

New York, NY | (212)-297-5800

hbrochin@daypitney.com

James M. Leva

Partner

Parsippany, NJ | (973) 966-8416

Stamford, CT | (973) 966-8416

jleva@daypitney.com

Glenn W. Dowd

Partner

Hartford, CT | (860) 275-0570

gwdowd@daypitney.com

Daniel L. Schwartz

Partner

Stamford, CT | (203) 977-7536

New York, NY | (212) 297-5800

dlschwartz@daypitney.com

Mark Salah Morgan

Partner

Parsippany, NJ | (973) 966-8067

New York, NY | (212) 297-2421

mmorgan@daypitney.com

Francine Esposito

Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com

Rachel A. Gonzalez

Partner

Parsippany, NJ | (973) 966-8201

New York, NY | (212) 297-5800

rgonzalez@daypitney.com

Theresa A. Kelly

Partner

Parsippany, NJ | (973) 966-8168

tkelly@daypitney.com