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New York Ban on Worker Non-Compete Clauses Awaiting Governor's Approval

On June 20, 2023, the New York State Assembly passed a bill (A01278) that, if sent to and signed into law by Governor Hochul, would broadly ban nearly all new worker noncompetition agreements, **effective 30 days after such approval by the Governor**.[1] Governor Hochul has expressed support for a restriction on non-competes imposed on workers making below the median wage in New York. However, the bill goes further than such a limited restriction, banning virtually all employment-related non-competes without regard to a covered individual's position or level of compensation.

The law would not apply retroactively. The bill bans new non-competes entered into on and after the effective date of the law. We encourage clients to review their existing agreements and other trade secret protections to determine what impact the bill would have on future agreements. Given that the law would apply prospectively, and not retroactively, employers may be able to take steps now to ensure that existing agreements stay in effect without amendment or modification after a potential effective date of the new law. If enacted, the law would represent a major overhaul of the restrictive covenant landscape in New York.

The bill contains certain limited exceptions. The bill does not apply to agreements that are for a "fixed term of service" or prohibit solicitation of clients of the employer that the covered individual learned about during employment. The bill also does not apply to prohibitions on the disclosure of trade secrets or confidential and proprietary client information. Note, however, that it is unclear whether this carve-out includes worker non-competes that embrace the "inevitable disclosure" doctrine[2] previously applied by New York courts to protect trade secrets.

Summary of proposed law. The bill, with certain exceptions, voids any contract to the extent it restrains anyone from "engaging in a lawful profession, trade, or business of any kind." The bill prohibits any employer, partnership, company, or other entity from seeking, requiring, demanding or accepting a "non-compete agreement" from any "covered individual." The bill defines "non-compete agreement" to mean "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." And "covered individual" is defined to mean "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." Because the drafting is not precise, a question could be raised as to whether independent contractors/consultants who rely heavily on compensation income from any given service provider could be considered covered individuals.

The bill creates a private right of action under New York law for covered individuals to bring suit seeking to (a) void any non-compete that violates the law; (b) obtain injunctive relief against enforcement of any such non-compete; (c) receive liquidated

[1] The New York State Senate had already passed the same bill (S1300A) on June 7, 2023.

[2] Under the inevitable disclosure doctrine, an employee who possesses a trade secret may be prohibited by written contract from commencing directly competitive employment in a nearly identical role in which the employee could not reasonably be expected to perform the new job without using the former employer's trade secrets.

damages up to $10,000 per covered individual; and (d) recover lost compensation, damages, and reasonable attorneys' fees and costs. Unlike other state statutes, the bill does *not* include requirements for choice-of-law or choice-of-forum provisions in agreements covered by the bill that may be entered into with New York employees or residents.

Significant open questions. The New York bill is unique. It does not model California's long-standing ban on employee non-competes or laws recently passed by other states to restrict certain employment non-competes. It does not match the Federal Trade Commission's proposed ban on non-competes. It is silent about many types of restrictive covenants that have been enforced by New York courts, including sale-of-business non-competes, forfeiture-upon-competition provisions, and non-solicitation of employee covenants. The bill also does not address compensation for noncompetition, such as notice periods, garden leave arrangements, or severance agreements entered into after service has ended. As a result, there are many open questions as to how the ban will be interpreted and applied by New York courts if it is signed into law, including:

- *Sale of business and partnership agreements*. The bill does not address a common practice of imposing non-compete obligations on employee-equity holders under equity purchase agreements for a fixed period from the date of sale, rather than the date of any termination of employment. It is also uncertain whether a sale-of-business non-compete would fall outside the scope of the ban if the purchaser does not employ the selling employee after the sale. The bill also does not include a specific carve-out for non-competes applicable to service partners under partnership agreements, as in other jurisdictions like California.

- *Forfeiture-upon-competition provision*s. The bill is silent about forfeiture-upon-competition provisions, which many employers use in equity award agreements or other compensation contracts. New York courts have enforced such restrictions under the "employee choice" doctrine, which holds that the employee has the choice whether to compete and forfeit certain economic benefits, or not to compete in order to keep the conditional consideration.

- *Compensation-for-noncompetition provisions*. The bill is silent about an employer's ability to compensate employees for post-employment noncompetition covenants. Common approaches include requiring employees to provide advance notice of resignation, or for employers to put employees on "garden leave," in each case in exchange for continued pay and benefits during the applicable period.

- *Fixed-term employment contracts*. The bill does not define what constitutes a "fixed term of service" agreement, which leaves some room for interpretation. The bill also does not address whether remedies for a breach of such an agreement would be limited in any way by the new law.

- *Non-solicitation of employee provisions*. The bill is silent about post-employment agreements not to solicit or hire a former employer's employees. New York courts generally enforce such provisions, in part because these restrictions do not prevent an employee from working for a new company that could be a competitor.

We are closely monitoring developments concerning the proposed law and plan to provide further updates as they occur, including in response to client inquiries.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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