

NYS Assembly Passes Bill Banning Post-Employment Covenants Not To Compete

On the heels of the FTC's proposed rule banning noncompete clauses with workers, which we reported on [here](#), on June 20, 2023 the New York State Assembly passed [A01278](#), which provides for a broad ban on post-employment noncompete restrictions. The New York State Senate already approved a version of the same bill [S3100A](#). The bill has not yet been signed into law, but if signed by Governor Hochul, New York will join California as one of the most restrictive states in the U.S. with respect to post-employment covenants not to compete. There are many elements of the bill that are unclear and warrant further clarification. Below, we address some initial questions with respect to the bill.

WHAT TYPES OF AGREEMENTS DOES THE BILL BAN?

The bill bans any agreement between an employer and a "covered individual" (see below) 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."

The bill further provides that "[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."

WHO IS A COVERED INDIVIDUAL?

The bill defines covered individual as "any ... 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."

This definition is broad and, notably, applies regardless of the employee's compensation, rank or

title. Interpretive questions remain regarding whether a partner in a partnership or an independent contractor is a "covered individual," particularly considering the bill's reference to contracts by which "anyone" is restrained from competing.

WHEN IS THE LAW EFFECTIVE?

Governor Hochul has 30 days from receipt to sign the bill. If signed, the law will take effect 30 days after signature.

DOES THE BILL APPLY TO EXISTING POST-EMPLOYMENT COVENANTS NOT TO COMPETE?

The bill applies to contracts "entered into or modified on or after [the] effective date." Interpretive questions remain regarding the types of modifications that would cause an existing contract to lose grandfathered status.

DOES THE BILL PROHIBIT CUSTOMER NON-SOLICITATION COVENANTS?

The bill provides that it should not be construed or interpreted as affecting any other regulation relating to, among others, "solicitation of clients of the

employer that the covered individual learned about during employment . . . provided that such agreement does not otherwise restrict competition in violation of this section.”

covenants with a New York employee or subject to New York law, please reach out to a member of the Executive Compensation and Benefits Group.

DOES THE BILL PROHIBIT EMPLOYEE NON-SOLICITATION COVENANTS?

The bill is silent regarding employee non-solicitation covenants.

DOES THE BILL INCLUDE AN EXCEPTION TO THE PROHIBITION ON POST-EMPLOYMENT COVENANTS NOT TO COMPETE IN CONNECTION WITH THE SALE OF A BUSINESS?

No. Note that these exceptions are frequently used in the M&A context. Both California and the FTC’s proposed rule provide for a sale of business exception.

DOES THE BILL ADDRESS POST-EMPLOYMENT COVENANTS NOT TO COMPETE GOVERNED BY AND COMPLIANT WITH ANOTHER JURISDICTION’S LAW?

No.

DOES THE BILL INCLUDE ANY OTHER EXCEPTIONS?

The ban does not apply to agreements that establish a fixed term of service or prohibitions of disclosure of trade secrets or confidential information.

WHAT ARE THE CONSEQUENCES OF VIOLATING THE LAW?

The bill provides covered individuals with a private cause of action that may be pursued within two years of the later of: (i) when the prohibited non-compete agreement was signed; (ii) when the covered individual learns of the existence 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 may provide “all appropriate relief” including up to \$10,000 in liquidated damages per covered individual.

We will provide an update if and when Governor Hochul signs the bill. In the meantime, if you have questions regarding new or existing restrictive

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