

Non-Compete Ban in New York Awaits Governor's Signature, by Keith J. Gutstein and Amanda B. Slutsky, 7-19-2023

In the coming days, New York State employers could be prohibited from entering into nearly all non-compete agreements. Currently, there is a bill on Governor Kathy Hochul's desk awaiting signature that will dramatically change the landscape for employment agreements throughout the state. In fact, the estimated 44.2% of New York employers who subject their employees to non-compete agreements may need to reevaluate their current policies.

The legislation (A1278B/S3100A), which already passed both houses of the New York State Legislature, would amend New York Labor Law and add a new section 191-d.

If signed by Governor Hochul, the law would go into effect 30 days thereafter and would apply to non-competes entered into or modified on or after that date.

Non-competes generally restrict workers from working for a competitor or opening a competing business for a particular period of time during an employee's employment and after an employee's tenure with the employer ceases.

The bill defines "non-compete agreement" to mean "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 included as a party to the agreement."

"Covered individual" is defined as "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 states that "every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void."

Growing Scrutiny

Non-competes have been the subject of growing scrutiny throughout the United States with critics saying that they block workers from securing higher wages and prevent businesses from being able to compete. This past January, the Federal Trade Commission (FTC) released a proposed rule that would effectively ban non-competes with limited exceptions. In addition, a handful of states have already passed legislation banning non-competes in most circumstances including Minnesota, California, North Dakota and Oklahoma.

New York would be the fifth state to follow suit.

The bill goes further than just banning non-competes. If signed, the law would allow covered individuals to bring a private right of action against any employer or persons alleged to have violated the statute.

This civil action must be brought within two years of the later of the date 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. The court has jurisdiction to void any such non-compete and to order all appropriate relief including liquidated damages up to \$10,000, lost compensation, and reasonable attorneys' fees and costs.

Exceptions

The proposed law does not prohibit an employer from entering into an agreement with a prospective or current covered individual that “establishes a fixed term of service or prohibits disclosure of trade secrets, disclosure of confidential and proprietary client information, or solicitation of clients of the employers that the covered individual learned about during employment, provided that such agreement does not otherwise restrict competition in violation” of Section 191-d. Although other states and the proposed FTC rule provide a limited exception to the prohibition of non-competes when a business is sold/purchased, the New York legislature did not provide a similar carve out. In fact, the legislature’s silence on this issue speaks volumes. At this time, it is unclear how New York courts may apply the non-compete ban in relation to the sale of a business. The courts may continue with common practice and “imply” a carve out into the bill for the sale of the business or determine there is no exception because if the legislature wanted the sale of a business to be an exception, it would have been addressed in the bill with the other limited exceptions.

Steps Employers Can Take

While we wait to see if Governor Hochul will sign the bill, employers should reassess their use of non-compete agreements, including whether there are alternatives to protect their business resources. They may also want to consider alternative forms of restrictive covenants in case this bill becomes law.

KAUFMAN DOLOWICH IS HERE TO HELP

If you have questions about these developments or are in need of assistance in evaluating your non-compete practices, please contact one of Kaufman Dolowich’s experienced Labor & Employment Law attorneys.