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Why Is Virtually Nobody Talking Seriously About New York's Potential Noncompete Ban?

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Earlier this year, legislation was proposed in New York that would effectively ban all post-employment noncompetes. Few paid close attention to the proposals, ostensibly because similar legislation is proposed virtually every year in states across the country, including in New York, and typically nothing comes of it (Minnesota being the major exception, having recently passed a noncompete ban that goes into effect July 1, 2023).

But then, on June 7, 2023, the New York Senate passed two bills (S3100A and S6748), both of which would ban noncompetes outright, albeit in different ways. The bills were delivered to the General Assembly for a vote before the end of its legislative session just two days later, on June 9, 2023. Still, the issue did not get widespread media attention. June 9, 2023 came and went without the General Assembly voting on either bill, although it is being reported (first by Russell Beck and then by the New York Post) that the General Assembly may reconvene later this month to complete unfinished business, which ostensibly would include these noncompete bills.

As we have previously discussed, if enacted, S3100A would prohibit all post-employment noncompetes for "Covered Individuals," which is defined vaguely 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." The term "Non-Compete Agreement" is similarly vaguely defined as "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."

The specific language of the ban is as follows:

> *No employer or its agent, or the officer or agent of any corporation, partnership, limited liability company, or other entity, shall seek, require, demand or accept a non-compete agreement from any Covered Individual.*

But the vagaries continue, as the bill goes on to say 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**," which some might argue implies that existing noncompetes will be voided. But later it clearly states that the law "shall take effect on the thirtieth day after it shall have become a law and **shall be applicable to contracts entered into or modified on or after such effective date**." Making things even more confusing, the Sponsor Memo appended to the bill states that the law "[v]oids current non-compete agreements and prohibits employers from seeking such agreement." So, which is it? Will existing noncompetes be void, or is the ban only applicable to noncompetes entered into after the effective date? And if the former, how does that comport with the Contracts Clause of the U.S. Constitution? And more practically, what effect will that have on noncompetes entered into in connection with lucrative severance packages, long term incentive plans, and the like, where the employees have already received the benefit of their bargain?

Another concerning aspect of the legislation is that a "Covered Individual" can bring a civil action against "any employer or persons alleged to have violated" the law within two years of either (1) when the prohibited noncompete is signed, (2) when the Covered Individual learns of the prohibited noncompete, (3) when the employment or contractual relationship is terminated, or (4) when the employer takes any step to enforce the noncompete agreement. (Note that (4) does not refer to a "prohibited" noncompete like the other sections do; it is unclear whether that was intentional and goes to the void/not void issue.) If such a lawsuit is brought and the employee prevails, the court can void the noncompete, enjoin its enforcement, order "liquidated damages," and/or award lost compensation, damages, reasonable attorneys' fees, and costs. The "liquidated damages" are "calculated as an amount not more than $10,000" and "the Court shall award liquidated damages to every Covered Individual affected." This could lead to the plaintiffs' bar seeking to file class actions on behalf of employees subject to noncompetes in New York, as they have in Washington state, but there would be multiple legal and factual hurdles that they are unlikely to overcome.

And there is no express carveout for noncompetes entered into in connection with the sale of a business, which even California law and the FTC's proposed noncompete ban include.

The bill does carve out "agreement[s] 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 information, or solicitation of clients of the employer that the Covered Individual learned about during employment"—although it then goes on to say, "provided that such agreement does not otherwise restrict competition in violation of" the law. So, there will at least be an argument that term contracts, nondisclosure agreements, and customer non-solicitation provisions will remain permissible if the law goes into effect. But even that comes with a caveat, as the prohibition on noncompetes quoted above reads similarly to California's Section 16600, which has been interpreted by the Courts there to encompass customer non-solicitation covenants as well, on the grounds that they impede the ability of employees to operate in a profession of their choice.

Making things even more confusing, S6748, which the New York Senate also passed on June 7, 2023, provides, among other things, that:

> *It is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer*

has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.

This language is effectively cribbed from the FTC's proposed rule, and like that proposed rule, this bill also (1) requires that employers rescind existing noncompetes and notify all affected employees that it has done so (even former employees still subject to a noncompete); and (2) prohibits so-called "de facto" noncompetes, including overbroad non-disclosure agreements and training repayment agreements that are not reasonable related to the cost the employer incurred for training the worker. Unlike S3100A (but like the proposed FTC rule), this bill does include an express carveout for noncompetes entered into in connection with the sale of a business. In addition, the definition of "non-compete clause" is different in each bill, and whereas S3100A applies to "Covered Individuals" (defined above), S6748 applies to "workers," which is defined as "a natural person who works, whether paid or unpaid, for an employer. The term includes, without limitation, an employee, individual classified as an independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides a service to a client or customer."

One question that comes immediately to mind is, if both bills pass the General Assembly and are signed by the Governor, which bill's definitions would apply? Which bill's remedies would be available? What about retroactivity? Before the General Assembly votes on either bill or the Governor signs them, these, and many other questions, need to be answered.

The bottom line is that both bills seem to have been hastily prepared and without input from all relevant stakeholders. Even if New Yorkers do want a noncompete ban—and presumably they would prefer compensation thresholds and notice requirements, like virtually every other state that has taken up the issue—such a ban could be drafted more clearly and with typical carveouts. As it stands, these bills—individually or together—will create substantial confusion in the New York business community.

Oddly, however, despite the fact that there are, by some estimates, almost 700,000 employers in New York state and approximately 220,000 in New York City alone (including 50 Fortune 500 companies statewide), we have heard little in the business (or legal) press about these bills, which would upend existing law and remove an important tool for protecting trade secrets and customer relationships. A similar thing happened in Washington, D.C. in 2020, when the D.C. Council quietly passed a noncompete ban. Once the business community took notice and began pushing back, however, the D.C. Counsel delayed the law's effective date multiple times, and ultimately watered it down so that only included compensation thresholds and notice requirements—a common end point for states that consider regulating noncompetes, even when they begin with proposals to ban noncompetes outright (e.g., Massachusetts, Illinois). Perhaps the same will happen here, but, as we publish this post, we are unaware of any concerted efforts by the New York business community, or any industry organizations, to publicly challenge or modify these bills. If any of our readers have heard anything different, please let us know.

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