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A Look at Three Noncompete Bans Under Consideration in NYC

WRITTEN BY

Tracey E. Diamond | Grace M. Goodheart

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Q: Is New York City considering a total ban on noncompete agreements?

A: Yes — a total ban on noncompete agreements would be the result of one of the three noncompete bills currently pending in the New York City Council, Committee on Consumer and Worker Protection.

You might remember that a similar bill was passed by the New York state Legislature and vetoed by Gov. Kathy Hochul late last year.

Now, the New York City Council has taken matters into its own hands with a series of three noncompete bills. If enacted, these bills would have various effects on New York City employers' abilities to enter into noncompete agreements with their employees.

Before we dive into the specifics of each bill, note that none of these bills would prevent employers from entering into and enforcing confidentiality or nonsolicitation agreements in order to protect confidential information, trade secrets, and customer relationships.

Now, on to what the bills would prohibit.

Bill No. Int 0140-2024 – Total Ban on Noncompete Agreements

The most expansive of the three proposed bills, Bill 140 would prohibit employers from entering into, attempting to enter into, or maintaining a noncompete agreement with any worker — including both employees and independent contractors.

Bill 140 also would require employers to rescind any existing noncompete agreements no later than the effective date of the law, which would be 120 days after the bill is passed.

Employers also would be prohibited from telling workers that they are subject to a noncompete clause if the employer does not have a good faith reason to believe that the worker is actually subject to such a clause.

Bill 140 does not provide workers with a private right to sue for violations of the law. Instead, the bill provides that any noncompete agreement in violation of its terms is unenforceable, and allows for a civil penalty of $500 per violation for any person who violates those terms.

If Bill 140 passes, the remaining two bills would not be necessary because Bill 140 would prohibit all noncompete agreements, including those addressed by the other two bills.

Bill No. Int 0146-2024 – Ban on Noncompetes for Low-Wage Workers

Bill 146 has two primary functions. First, it would prohibit noncompete agreements for "low-wage employees," which is a catch-all term encompassing "clerical or other workers" who fall outside of certain categories.

Employers would still be able to enter into noncompete agreements with (1) manual workers, such as mechanics, workingmen, or laborers; (2) railroad workers; (3) commission salespeople; or (4) bona fide executive, administrative or professional employees whose earnings are in excess of $1,300 per week.[1]

Second, for those classes of employees whom an employer is permitted to tie to a noncompete, Bill 146 would require the employer to disclose, in writing and at the beginning of the hiring process, that the employee may be asked to enter into a noncompete agreement.

Both provisions would apply only to noncompete agreements entered into after the effective date of the law, if enacted. Existing noncompete agreements would not be affected.

Bill 146, like Bill 140, does not give individuals a private right to sue for violations — instead, it states only that the Office of Labor Standards will enforce the requirements of the law. Moreover, unlike Bill 140, Bill 146 does not provide for any specific penalty for violations.

Bill No. Int 0375-2024 – Ban on Noncompetes for Freelance Workers

Bill 375 addresses noncompete agreements for freelance workers, which the bill defines as any individual person working as an independent contractor.

The definition includes individuals who contract through a corporation or trade name, so long as they are the only individual in the organization. In other words, the bill would not apply to an independent contractor that has its own employees.

The definition also does not include outside sales representatives, lawyers, medical professionals or individuals or entities that are members of the Financial Industry Regulatory Authority.

One unique aspect of Bill 375 is that, unlike Bills 140 and 146, it allows noncompete agreements with freelance workers if the hiring party pays the freelance worker an agreed-upon amount of money for the entire term of the noncompete agreement.

Bill 375 does not require that the payment be in any specific amount, only that the hiring party and freelance

worker must agree on the amount, it must be paid either bi-weekly or monthly over the term of the noncompete, not in a lump sum, and if the hiring party fails to pay, the noncompete immediately becomes null and void.

Bill 375, like Bill 146, would only apply to noncompete agreements entered into after the effective date of the law, not to existing agreements.

Bill 375 is also unique in that it exempts government entities — from the federal government all the way down to local, municipality or county governments — from the ban. Therefore, even if enacted, those government entities would still be able to enter into noncompete agreements with freelance workers.

Finally, unlike the other bills, Bill 375 would give freelance workers a right to sue for violations of the law. If successful, a freelance worker would be entitled to $1,000 in statutory damages, reasonable attorney fees and a declaration that the noncompete is unenforceable.

In addition to private suits from freelance workers, companies that violate the proposed law would be subject to a civil penalty of $500 per violation or, if the director of labor standards finds reasonable cause to believe that the company has a 'pattern or practice' of violations, they may sue on behalf of the city to impose a civil penalty up to $25,000.

Key Takeaways

Although none of these bills has passed in the New York City Council yet, they reflect growing anti-noncompete sentiment across the nation.

Despite potential legislative and judicial challenges to a total ban on noncompetes such as Bill 140, the less restrictive provisions in Bills 146 and 375 may have a higher likelihood of being enacted, and would still require a substantial change to many employers' noncompete practices.

For example, some employers may need to update job descriptions for exempt employees to include a disclaimer that noncompete agreements are required.

Employers that frequently contract with freelance workers would need to ensure that they negotiate with freelance workers over the amount to be paid in exchange for a noncompete agreement.

Many employers would need to reevaluate their hiring processes to ensure that hiring managers and human resources professionals know which employees can be offered a noncompete agreement and which cannot.

Employers located in New York City, or those with employees in New York City, should keep a close watch on these three bills as they pass through the City Council.

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[1] Effective March 13, 2024.

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