

Locke Lord QuickStudy: New York Governor About to Sign ?Flawed Non-Compete Legislation??

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On June 20, 2023, the New York State Assembly passed [Assembly Bill 1278](#), which was passed by the New York State Senate earlier this month, prohibiting certain non-compete agreements and restrictive covenants in New York. The bill has been sent to Governor Kathy Hochul for review and signature. If signed into law, it would amend the New York Labor Law to void “[e]very contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind” and make it unlawful for an employer or its agents to “seek, require, demand or accept a non-compete agreement from any covered individual.” Despite the bill being promoted as a clear rule against non-competes, it contains an abundance of uncertainties that could lead to years of litigation. For that reason, instead of signing the bill, the Governor may return the bill to the legislature to clarify a number of key points.

What exactly does the bill say?

The bill broadly defines “non-compete agreement” 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.” It 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.” The bill includes few exceptions, which include agreements that prohibit non-disclosure agreements protecting trade secrets and confidential information as well as agreements prohibiting the solicitation of the employer’s clients that the covered individual learned about during their employment. However, those exceptions are then subject to the following limitation, which states, “provided that such agreement does not otherwise restrict competition in violation of this section.”

The bill creates a private right of action for both employees and certain workers who may be treated as independent contractors, allowing them to bring suit against an employer within two years of (i) the date the non-compete was signed; (ii) the date the employee or contractor learns of the non-compete agreement; (iii) the date the employment or the contractual relationship is terminated; or (iv) the date on which the employer takes any step to enforce the non-compete agreement.

Key uncertainties that warrant clarification by the legislature

The following are some of the many issues raised by the legislation:

- Does the bill's language that a non-compete agreement must "prohibit or restrict" an employee from "obtaining employment" after the conclusion of employment with the employer mean employment with any and every new employer or may a contract permit employment generally but list a few specific competitors by whom the employee cannot become employed?
- Does the bill's language referencing restrictions and prohibitions on "obtaining employment" bar post-employment restrictions on providing services as a non-employee consultant? Does it bar post-employment restrictions on significant investments in a competitor?
- Does the bill's language focusing on employment arrangements permit non-competes in purchase agreements, even if a party to a purchase agreement also becomes or remains an employee of the company that has been purchased?
- Does the bill prohibit stock option plans that include a clause that permits post-employment competitive employment but conditions receipt, retention or continued vesting of stock options on non-employment by a competitor following termination of employment?
- Does the bill void current non-compete agreements entered into prior to the passage of the bill? What about current litigation involving non-compete clauses?
- If an employee received money or something of value for entering into a non-compete, must the employee return the consideration in whole or in part on the basis that the contract is "void"?
- Does the bill's language permitting prohibitions on the "solicitation of clients of the employer" mean that an agreement can also prohibit an employee from directly or indirectly inducing *others* to solicit the employer's clients?
- What types of agreements barring the use or disclosure of confidential information and trade secrets "restrict competition" and what types do not?
- Does the bill bar any agreements that prohibit employees from inducing co-workers to leave the company and join another employer?
- Are employers required to affirmatively rescind existing non-compete agreements?
- Are notice provisions (such as a 30- or 60-day notice of resignation) barred by the bill?

New York would be the fifth state to bar all or certain non-compete agreements if this bill is signed by the Governor. Other jurisdictions that have non-compete restrictions are more limited and focused upon the overuse of non-competes. If the Governor sends this bill back to the legislature, she should also suggest that the bill provide carve-outs for valid circumstances when non-competes serve overriding business objectives – and not just those involved in the sale of a business.

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