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Trade Secrets Alert

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New York could become latest state to ban noncompete agreements

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If signed into law, the bill would apply to all workers — including independent contractors.



What's the Impact?

- / The ban would apply to agreements entered into on or after the effective date but would not affect existing non-competition agreements.
- / The bill language would create a civil cause of action—with mandatory liquidated damages—for aggrieved workers.
- / Employers should review their current agreements to determine whether they may need to be revised to comply with the new statute.

This week, the New York State Assembly passed a bill that, if signed by Governor Hochul, would ban the use of noncompetition agreements in New York, a seismic change for New York employment law. The proposed law would apply broadly to all workers, including both employees and independent contractors, and would create a civil cause of action—with mandatory liquidated damages—for aggrieved individuals. If signed into law, the ban would apply to agreements entered into on or after the effective date. Existing non-competition agreements entered into before that date would not be controlled by the new law.

The proposed restrictions

The bill would amend New York's Labor Law to prohibit "non-compete agreements" for any "covered individual." Non-compete agreements are broadly 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." A covered individual is also broadly 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."

Express carve-outs

While the bill expressly applies to non-competition agreements, it does not cover several other types of restrictive covenants, such as (i) fixed term-of-service agreements, (ii) non-disclosure agreements that prohibit the use or disclosure of a company's trade secret or confidential information, or (iii) customer non-solicitation agreements related to "clients of the employer that the covered individual learned about during employment," so long as such agreements do "not otherwise restrict competition in violation of this section." The bill does not expressly address the enforceability of non-solicitation clauses or non-competition agreements entered into in connection with the sale of a business, although the bill's definitions noted above suggest that the restrictions are limited to the employment context.

Enforcement

The bill, which would take effect 30 days after becoming law, provides that a covered individual may bring a civil action against any employer who violates the ban and expressly authorizes the court to void any such agreement and "to order all appropriate relief, including enjoining the conduct of any person or employer; ordering payment of liquidated damages; and awarding lost compensation, damages, reasonable attorneys' fees and costs." The bill caps liquidated damages at \$10,000 but provides that a court "shall award liquidated damages to every covered individual affected under this section, in addition to any other remedies permitted by this section."

Next steps for employers

Governor Hochul has not indicated whether she will sign the legislation. Nevertheless, given the dramatic potential change here, employers should review their current agreements carefully to determine whether they need to be revised to comply with the new proposed law. Experienced counsel who are part of Nixon Peabody's [Non-Compete & Trade Secrets](#) team are available to assist you in this analysis and to draft the provisions needed to comply with any changes in New York law.

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