Cahill

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UPDATE: Governor Vetoes New York's Proposed Non-Compete Ban, but Legislative Efforts Likely to Continue in 2024

This memorandum provides an update to the memorandum distributed by Cahill on December 21, 2023 describing New York's pending non-compete bill, which was subsequently vetoed by Governor Kathy Hochul.

Governor Kathy Hochul has vetoed New York State Assembly bill A1278B (also known as New York State Senate bill S3100A), which would have established a ban on non-compete agreements between employers and all employees, from entry-level employees all the way to C-Suite executives.[1] As this year's legislative session has already come to a close, there will be no opportunity for the legislature to override the veto.

In recent remarks to the press before issuing the veto, the governor had signaled her desire to see the law modified to focus on protecting low and middle-income workers,[2] (i.e., by potentially limiting the ban to individuals earning less than $250,000/year). However, during the final negotiations, the governor and lawmakers could not agree on the compensation threshold and how it should be calculated.[3] Numerous states have enacted laws in recent years prohibiting employers from entering into non-competes with employees being paid below a specified annual salary or hourly wage (or precluding non-competes with hourly workers entirely).[4] While this appears to be the governor's preferred approach, it is unclear whether the governor and the legislature will be able to agree on future legislation. The Senate sponsor of the bill, State Senator Sean Ryan of Buffalo, has already indicated that he plans to reintroduce the legislation next year.[5]

Description of the Vetoed Bill

Total Ban on Non-Compete Agreements

The bill provided that, "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."

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[1] Luis Ferré-Sadurní, *Hochul Vetoes Ban on Noncompete Agreements in New York*, N.Y. TIMES, Dec. 22, 2023.

[2] Lauren Weber and Jimmy Vielkind, *New York Considers Ban on Noncompete Pacts*, WALL ST. J., Dec. 7, 2023.

[3] Ferré-Sadurní, *supra* note 1. In addition to failing to reach a compromise on the dollar amount for the compensation threshold, the parties were unable to agree on how certain items, such as bonuses and stock options, should be included when determining an individual's annual compensation.

[4] See *infra* note 8.

[5] Ferré-Sadurní, *supra* note 1.

Key Definitions

The key definitions provided in the bill were as follows:

- "non-compete agreement" was 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; and
- "covered individual" was 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.

Exceptions for Restrictive Covenants other than Non-Competes

The bill would have provided carve-outs for agreements with covered individuals that: (i) establish a fixed term of service, (ii) prohibit disclosure of trade secrets or confidential and proprietary client information or (iii) prohibit solicitation of clients of the employer that the covered individual learned about during employment, with the rather ambiguous proviso for all of the aforementioned exceptions *that such agreement does not otherwise restrict competition in violation of the bill*. The carve-out for client non-solicit clauses permitted employers to apply such restriction to clients the employee learned about during the period of employment, without requiring that the employee had any involvement with such client. Notably, however, the bill was silent as to covenants not to solicit a former employer's employees.

No Sale-of-Business Exception

The bill did not reference non-competes entered into in the sale-of-business context. A lack of such exception would have made New York's non-compete ban potentially even more restrictive than the non-compete ban in California, which has long prohibited employee non-competes but provides for an explicit sale-of-business exception.[6]

Private Right of Action

In addition to prohibiting employee non-competes, a notable aspect of this bill was the private right of action. Under the bill, a covered individual could bring a civil action against an employer or persons alleged to have violated the bill, provided that such action was brought within two years of the later of when (i) the prohibited non-compete agreement was signed, (ii) the covered individual learns of the prohibited non-compete agreement, (iii) the employment or contractual relationship is terminated or (iv) the employer takes any step to enforce the non-compete agreement. This section further provided that a court shall have jurisdiction to void any such non-compete agreement and to order all appropriate relief, including enjoining the conduct of any person or employer, ordering payment of liquidated damages (capped at $10,000) and awarding lost compensation, damages, reasonable attorneys' fees, and costs. With respect to the awarding of liquidated damages, the bill provided that "the court *shall* award liquidated damages to every covered individual affected under this section, in addition to any other remedies permitted by this section."

Effective Date

While the effective date language of the bill was expected to be straightforward, that provision itself created ambiguity regarding the applicability of the ban to existing non-competes. The bill stated that, once effective (which

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[6] See CAL. BUS. & PROF. CODE, § 16,601.

would have been 30 days after signing), it would apply to contracts entered into *or modified* on or after the effective date. However, it is not clear from the bill what kind of modification to an existing contract would result in a non-compete no longer being enforceable (e.g., would the modification need to be material?), or if any amendment or change to such a contract would void the non-compete.[7] This lack of clarity could lead employees to assert (in the common situation in which a non-compete is included within an individual's employment contract, rather than as a standalone agreement) that changes to provisions entirely unrelated to the non-compete, such as an amendment reflecting a change in salary or title, or merely extending the term of the agreement, would constitute a modification within the meaning of the bill and therefore void the non-compete going forward.

Broader Non-Compete Landscape

As noted above, several states have enacted legislation in recent years to limit the use of employee non-competes with lower wage workers, with laws in Colorado, Illinois, Maine, Maryland, Massachusetts, Nevada, New Hampshire, Oregon, Rhode Island, Virginia and Washington establishing salary or hourly wage thresholds (or prohibiting non-competes with hourly workers).[8] By contrast, only California, North Dakota, Oklahoma and Minnesota (which enacted a non-compete ban this year) have complete bans on the use of such restrictive covenants with employees.[9]

New York's proposed non-compete legislation also follows the federal government's efforts through agency actions to restrict the ability of employers to enter into non-compete agreements with employees. As discussed in Cahill's Firm Memorandum, dated June 22, 2023, the General Counsel of the National Labor Relations Board recently issued a memorandum articulating the position that, except in limited circumstances, non-compete agreements entered into with non-management employees violate the National Labor Relations Act. Moreover, the Federal Trade Commission's Proposed Non-Compete Rule, if enacted, would establish a national ban on employee non-competes, which would not distinguish between rank-and-file employees and members of senior management (but would include a carve-out for a sale of a business).

Looking Ahead

With Governor Hochul now having vetoed the proposed non-compete ban, along with the push-back the bill received from business groups and other interested parties, it remains to be seen what form of non-compete legislation could be agreed upon by the governor and lawmakers, if a similar bill is introduced during the 2024 legislative session – as Senator Ryan has already promised.[10] Should non-compete legislation come into effect in New York, it would continue a national trend toward limiting or outright prohibiting employee non-competes and, while the actions at the federal level may be slow-moving, such a law in New York may serve as a catalyst for other states to examine passing similar legislation.

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[7] The sponsor of the bill, Senator Sean Ryan, has stated that should Governor Hochul reopen negotiations on the bill, he may consider proposing language to nullify existing non-competes. See Weber, *supra* note 2.

[8] See COLO. REV. STAT. ANN. § 8-2-113(2)(a)–(b) (2022); 820 ILL. COMP. STAT. 90/10(a) (2017); ME. REV. STAT. ANN. tit. 26, § 599-A (3) (2019); MD. CODE ANN., LAB.& EMPL. § 3-716(a)(1)(i) (2019); MASS. GEN. LAWS ANN. Ch. 149, § 24L(c) (2021); NEV. REV. STAT. § 613.195(3) (2021); N.H. REV. STAT. ANN. § 275:70-a(II) (2019); OR. REV. STAT. § 653.295(1)(e) (2022); R.I. GEN LAWS § 28-59-3(a)(1) (2020); VA. CODE ANN. § 40.1-28.7:8(B) (2020); WASH. REV. CODE ANN. §§ 49.62.020(1)(b), 49.62.030(1) (2020).

[9] See CAL. BUS. & PROF. CODE, § 16,600; N.D.C.C. § 9-08-06; OKLA. STAT. ANN, ART. XV § 218; MINN. STAT. § 181.988.

[10] Ferré-Sadurní, *supra* note 1.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Geoffrey E. Liebmann (partner) at 212.701.3313 or gliebmann@cahill.com; Joel Kurtzberg (partner) at 212.701.3120 or jkurtzberg@cahill.com; Mark Gelman (counsel) at 212.701.3061 or mgelman@cahill.com; Lauren Perlgut (counsel) at 212.701.3558 or lperlgut@cahill.com; or Eric Scher (senior attorney) at 212.701.3984 or escher@cahill.com; or email publicationscommittee@cahill.com.