

## > Client Alert

### New York Passes Bill to Ban Non-Compete Agreements

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On June 20, 2023, the New York State Assembly passed bill A01278B, effectively prohibiting new non-compete agreements from being entered into or modified after the bill goes into effect. Below is an overview of the key provisions of the bill.

#### Prohibition on Non-Compete Agreements

The bill adds a new Section 191-d to the New York Labor Law, which

- prohibits employers from requiring or accepting non-compete agreements from “covered individuals” and
- voids non-compliant contracts that would restrain an individual from engaging in a lawful profession, trade, or business.

**“Non-compete agreement”** is defined as any agreement or clause that prohibits or restricts a covered individual from obtaining employment after their association with the employer.

**“Covered individual”** is defined as someone who performs work or services for another person and is in a position of economic dependence on and obligation to perform duties for that person.

#### Private Right of Action

The bill includes a private right of action allowing covered individuals to bring a civil action against an employer who has violated new Section 191-d of the New York Labor Law. The court will have the authority to void the applicable non-compete agreement, grant injunctive relief and award monetary damages, which may include liquidated damages (not to exceed \$10,000), lost compensation, reasonable attorney's fees, and costs.

A private right of action must be initiated within two years after the latest of: (i) signing the non-compete agreement, (ii) the covered individual learning of the existence of the non-compete agreement, (iii) termination of the covered individual's employment or contractual relationship, or (iv) the employer taking steps to enforce the non-compete agreement.

## Broad Applicability; Lack of Exceptions

As compared to similar laws in other states (e.g., California, Massachusetts, etc.), the prohibitions in New York's proposed new law are quite broad. For example, the law does not include any minimum salary threshold, and most notably does not include exceptions for the sale of a business or a partner exiting a partnership. It also does not include an option for employers to provide additional compensation or other consideration in exchange for agreeing to non-compete restrictions.

It is important to note that the new law does **not** apply to the following types of contracts or clauses between an employer and a covered individual, so long as these contracts or clauses do not otherwise violate the terms of new Section 191-d of the New York Labor Law:

- Contracts for a fixed term of service;
- Confidentiality agreements prohibiting the disclosure of trade secrets or confidential and proprietary client information; or
- Agreements prohibiting the solicitation of clients of the employer that the covered individual learned about during the course of their employment.

In addition, new Section 191-d of the New York Labor Law only applies to contracts entered into or modified on or after the law's effective date. Accordingly, it will not apply retroactively or void any existing non-compete agreements already in place.

## Timing; Effective Date

A version of the same bill was already approved by the New York State Senate (Senate Bill S3100A) on June 7, 2023, and the bill now heads to Governor Hochul, who has 30 days to sign it. If signed by Governor Hochul, the new law would take effect 30 days thereafter.

## Open Questions

If enacted, the scope of the new law will likely need to be more clearly defined by the courts. Some of the unanswered questions in the bill include:

- Employee Non-Solicitation. Whether employee non-solicit provisions would violate Section 191-d of the New York Labor Law as a restraint on engaging in a lawful profession, trade, or business. The bill notably did not include employee non-solicit provisions in the carve-out for customer non-solicitations.
- Independent Contractors. Whether "covered individuals" include independent contractors, though it is notable that courts in New York have historically disfavored, and declined to enforce, non-competition restrictions with respect to independent contractors regardless of this new law.
- Modifications to Existing Agreements. Whether any modification to an existing agreement containing a non-compete provision would still be considered exempt from Section 191-d of the New York Labor Law, or whether any modifications whatsoever would render the non-compete void.
- Forfeiture for Competition Clauses. Whether economic penalties that effectively (but not expressly) restrain competition, such as clawbacks of severance or forfeiture of vested equity upon an employee engaging in competitive behavior, would be banned or give right to a private right of action under Section 191-d of the New York Labor Law.

We will continue to monitor any further developments related to this legislation and its potential impact on businesses in New York State. If you have any questions or require assistance in navigating these changes, please do not hesitate to contact us.

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The Morrison Cohen LLP Executive Compensation & Employee Benefits and Labor & Employment teams are here to help employers navigate their compliance with any new legislation pertaining to non-compete agreements and any other employment matters.