



The New York State Assembly passed a bill on June 20, 2023, which, if signed by New York Governor Kathy Hochul, will impose a blanket ban on—and render unlawful—all future noncompete agreements. New York's proposed law is the most recent crackdown on the enforceability of noncompetes amid a wave of federal and state efforts to limit such agreements or prohibit them outright.

## **The Bill**

If enacted, the law will prohibit New York employers from entering into post-employment noncompete agreements with any worker, regardless of the worker's position, classification, or salary. Accordingly, the law broadly defines a noncompete 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 the employment." In turn, the law defines a "covered individual" 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." This definition suggests that both employees and certain independent contractors are protected by the law.

Importantly, the law only applies to "contracts entered into or modified on or after" the law's effective date. Therefore, the law will not apply to noncompete agreements that are currently in effect unless such agreements are modified after the law's effective date. The law also clarifies that contracts featuring unenforceable noncompete provisions will, "to that extent," be void, meaning that the remaining provisions of a broader contract may remain enforceable.

### **Private Right of Action and Damages**

The law carries substantial consequences and provides a private right of action, enabling covered individuals to file a lawsuit in response to alleged violations. Specifically, in addition to the noncompete agreement being voided, employers found to be in violation of the law could be subject to injunctive relief and monetary damages, including lost compensation, attorneys' fees and costs, and liquidated damages up to \$10,000 per violation. In fact, the law requires courts to award liquidated damages "to every covered individual affected" by the law, in addition to any other available remedies. Covered individuals may file a lawsuit within two years from the later of the date on which: (1) the prohibited noncompete agreement was signed; (2) the covered individual learns of the prohibited noncompete agreement; (3) the covered individual's employment or contractual relationship is terminated; or (4) the employer takes any step to enforce the violative noncompete agreement.

### **Other Restrictive Covenants**

New York's new law states that it will not affect the use of other restrictive covenants, including agreements prohibiting the disclosure of trade secrets, the disclosure of confidential and proprietary information, or agreements restricting covered individuals from soliciting an employer's clients insofar as the covered individual learned about such clients during their employment. That said, these carve-outs come with a notable proviso: The law provides that such other restrictive covenants are unaffected by the law as long as they "do[] not otherwise restrict competition in violation of this [law]." This proviso can be expected to affect the enforceability of restrictive covenants beyond just noncompete agreements and broaden the range of claims filed by covered individuals.

## Next Step for Employers

If signed into law by Governor Hochul, the law will take effect 30 days thereafter. In anticipation of this transformative change and the growing number of jurisdictions prohibiting or limiting the use of noncompete agreements and other restrictive covenants, employers must promptly reassess and revise their employment-related agreements and policies and consider other lawful means of protecting their business interests.

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