Legal Update Article

A Step Too Far? Governor Hochul Vetoes New York Non-Compete Ban

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New York Governor Kathy Hochul vetoed Senate Bill S3100A, a bill passed by both houses of the legislature in June, that would prohibit all non-compete agreements.

This is a significant and interesting end to a year of upheaval in the world of non-compete agreements and other restrictive covenants. In January 2023, the Federal Trade Commission issued a proposed rule to ban all non-compete agreements. In May, Minnesota enacted a statute that bans non-compete agreements. Also in May 2023, the National Labor Relations Board's general counsel issued a memorandum declaring that non-compete agreements violated employees' rights under Section 7 of the National Labor Relations Act. In September and October, California doubled down on its long-standing law holding that non-compete agreements are void to say they are unlawful, to create a private right of action to challenge them, and to require employers to give notice that any such agreements in place in fact are void. The freight train against non-competes seemed unstoppable.

Problems With New York Senate Bill S3100A

As drafted, the New York bill had many problems. Here are some of them:

1. It created a total ban on all non-compete agreements, regardless of the context or the level of employees signing them. The ban applied equally to CEO's as well as the lowest level employees in the organization.

2. Unlike a dozen or so other states that imposed more nuanced limitations on the use of non-compete agreements, it did not include a salary minimum or other compensation threshold above which non-compete agreements could be used. Again, it provided for a total ban.

3. Likewise, there was no carve-out for agreements or clauses calling for forfeiture of incentive compensation of any type if the employee left to go to a competitor. In other words, incentive compensation (designed to induce an employee to remain with the employer) might have to be paid out even if the employee joined a direct competitor. Many New York employers utilize these types of plans, which currently are enforceable under the New York "employee choice doctrine."

4. There also was no carve-out for non-compete agreements arising from the sale of a business. This was a remarkable omission, which could have led to unintended consequences on the valuation of businesses of all sizes. It even could have discouraged deals altogether.

5. Although the bill already banned non-compete agreements in other sections of the proposal, it also would have gratuitously included language identical to California's Business & Professions Code §16600. This inclusion was potentially problematic as that

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> law, through a century and a half of litigation, had developed in ways that were inconsistent with other provisions of the New York bill, possibly creating ambiguity and confusion.

6. The definitions (including the definition of who is a "covered individual") were unclear and did not address a variety of circumstances in which non-compete agreements could be used.

7. It did not explicitly address non-solicitation of employees restrictions, although it permitted non-solicitation of client restrictions.

In her December 22, 2023, veto memo, Governor Hochul noted the bill "would broadly prohibit all non-compete agreements in New York." She stated that she has "long supported limits on non-compete agreements for middle-class and low-wage workers, protecting them from unfair practices that would limit their ability to earn a living."

We understand there were significant efforts by Governor Hochul and legislative leaders to reach consensus on various points of disagreement, particularly during the 10-day consideration period after the bill was officially "Delivered" to Governor Hochul on Dec. 12, 2023. On Nov. 30, 2023, Governor Hochul expressed that she wanted to "strike a balance" by protecting lower- and middle-income workers earning below $250,000, without driving businesses out of state. After noting that she "attempted to work with the legislature in good faith on a reasonable compromise," she offered this reasoning for her veto:

> My top priority was to protect middle-class and low-wage earners, while allowing New York's businesses to retain highly compensated talent. New York has a highly competitive economic climate and is home to many different industries. These companies have legitimate interests that cannot be met with the Legislation's one-size-fits-all approach.

Agreement reportedly could not be reached on a minimum salary threshold or how that should be calculated. We have heard, however, that progress had been made with respect to other problematic areas of the original bill, including on issues surrounding the incentive compensation forfeiture and sale of business exception.

Next

Senator Sean Ryan, who sponsored Senate Bill S3100A, has indicated that non-compete legislation will be reintroduced in 2024. Presumably, a new effort to enact non-compete legislation will take into account the significant problems with the 2023 bill, heed Governor Hochul's focus on "middle-class and low-wage earners," and reach a sensible compromise.

Jackson Lewis attorneys continue to monitor the world of non-compete and other restrictive covenants. Please contact a Jackson Lewis attorney with any questions.