Legal Update Article

NY's Non-Compete Bill: What Employers Can Expect from a Newly Proposed Ban

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Takeaways

- A bill to ban employment non-competes for all but highly compensated individuals is being considered by the New York state legislature.
- Gov. Hochul vetoed a similar bill in 2023, and the latest proposal appears to respond to the veto memo.
- If passed, the ban will be go into effect 30 days after it is signed by the governor and apply only to new or modified non-competes, not retroactively.

Related links

- NY State Senate Bill 2025-S4641
- New York Non-Compete Ban Goes to Governor
- A Step Too Far? Governor Hochul Vetoes New York Non-Compete Ban

Article

A bill introduced in the New York State Senate on Feb. 10, 2025, would prohibit nearly all non-compete agreements arising in employment. Consistent with a national trend, non-competes for healthcare professionals would be banned.

The sponsor of the latest proposal (S4641), State Sen. Sean Ryan, also sponsored the 2023 bill that sought a broad ban on all non-competes. The legislature passed the 2023 bill, but Gov. Kathy Hochul vetoed it.

S4641 would add New York Labor Law Section 191-d, "Non-compete agreements." The section contains definitions and prohibitions and creates a private cause of action. S4641 would go into effect 30 days after becoming law and be applicable to contracts entered into or modified on or after the effective date. The bill does not appear to require retroactive application or void existing non-compete agreements.

Definitions

Section 191-d defines the following terms:

- "Non-compete agreement" means "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." (Emphasis added.) The bill would apply to true non-competes, not to other restrictive covenants.

- "Covered individual" means "any person *other than a highly compensated individual who,* whether or not employed under a contract of employment, performs or has

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performed 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." (Emphasis added.)

- "Highly compensated individual" means "any individual who is compensated at an average annualized rate of cash compensation … equivalent to or greater than *[$500,000] per year."* (Emphasis added.) Cash compensation is determined with reference to "the individual's three most recent W-2 statements and … K-1 statements, or all such statements from the duration of the individual's employment if the term of employment is less than three years …."

- "Health related professional" includes physicians, physician assistants, chiropractors, dentists, perfusionists, veterinarians, physical therapists, pharmacists, nurses, podiatrists, optometrists, psychologists, occupational therapists, speech pathologists, audiologists, and mental health practitioners, all as licensed under New York law.

Prohibitions

Section 191-d would prohibit an employer, or its agent, or the officer or agent of any corporation, partnership, limited liability company, not-for-profit corporation or association or other entity, from seeking, requiring, demanding or accepting a non-compete agreement from any Covered Individual or Health Related Professional. Any non-compete agreement sought, required, demanded, or accepted after the effective date of Section 191-d will be "null, void, and unenforceable."

Private Right of Action

Section 191-d(3) would create a private cause of action for any Covered Individual to "bring a civil action in a court of competent jurisdiction against any employer or persons alleged to have violated [Section 191-d]."

The bill provides for a shifting statute of limitations. A Covered Individual has two years from the *later of the* date: "(i) when the prohibited non-compete agreement was signed; (ii) when the covered individual learns of the prohibited non-compete agreement; (iii) when the employment or contractual relationship is terminated; or (iv) when the employer takes any step to enforce the non-compete agreement."

As remedies, a court may void any such non-compete agreement and "order all appropriate relief, including enjoining the conduct of any person or employer; ordering payment of liquidated damages; and awarding lost compensation, compensatory damages, reasonable attorneys' fees and costs" to the Covered Individual or Health Related Professional.

Section 191-d states that "liquidated damages" will be calculated as an amount not more than *$10,000* per Covered Individual or Health Related Professional. Beyond having "jurisdiction" to award liquidated damages, the bill confusingly states that a court "shall" award liquidated damages to "every" Covered Individual affected under Section 191-d.

Exceptions, Including for Sale of Business

Section 191-d provides a carve-out for certain other restrictive covenants. Permitted agreements include:

- Agreements with a prospective or current covered individual that established a fixed term of service and/or exclusivity during employment.

- Agreements with a prospective or current covered individual that prohibits disclosure of trade secrets.

- Agreements with a prospective or current covered individual that prohibits disclosure of confidential and proprietary client information.

- Agreements with a prospective or current covered individual that prohibits solicitation of clients of the employer.

This carve-out section, however, contains the vague proviso, "provided that such agreement does not otherwise restrict competition in violation of this section." The carve-out section also is silent with respect to non-solicitation of employees covenants.

Section 191-d will not prohibit "the inclusion and enforcement of non-compete agreements or other similar covenants in the sale of the goodwill of a business or the sale or disposition of a majority of an ownership interest in a business by a partner of a partnership, a member of a limited liability company … or any such person or entity owning fifteen percent or more ownership interest in a business."

Existing Ban (Section 202-k)

Section 191-d(5) states that it may not be construed to amend, modify, impair, or otherwise affect the application of enforcement of New York Labor Law Section 202-k, which already bans non-compete agreements for certain broadcast industry employees.

Severability

Section 191-d permits severability if any of its provisions, or portions thereof, are found to be invalid, leaving the rest of the law intact.

Differences From 2023 Bill

S4641 appears to attempt to address problems Gov. Hochul noted in her Dec. 22, 2023, veto memo. It differs from the 2023 version that Gov. Hochul vetoed in three ways:

- Inclusion of a salary or compensation minimum threshold (the "highly compensated individual").
- Inclusion of a carve-out for the sale of a business.
- Omission of language identical to California's Business & Professions Code §16600.

Next Steps

If the legislature passes the bill and it is sent to the governor for signature, Gov. Hochul can sign it, veto it, or secure changes through a chapter amendment process. We anticipate intense lobbying efforts for and against, as happened in 2023.

Please contact a Jackson Lewis attorney with any questions about potential strategies for non-competes and restrictive covenants.