Insights: Alerts

New York City Council Takes Aim at Non-Compete Agreements

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As previously reported, federal agencies, such as the Federal Trade Commission and National Labor Relations Board, and several states are limiting the use of employee non-compete agreements or banning them altogether.

New York seemed poised to join the fray last year when its legislature passed a bill that would impose a broad ban on non-compete agreements in the state with retroactive application and without an exclusion for non-competes entered into in connection with the sale of a business. The bill was vetoed by New York Governor Kathy Hochul in December, to the relief of New York employers. The relief was short-lived, however, as the New York City Council recently introduced three new bills that would either ban non-compete agreements altogether or implement a wage threshold on the use of non-competes.

New York City Council's Proposed Bills

On February 28, 2024, members of the New York City Council introduced three different bills seeking to eliminate or severely limit the use of non-compete agreements in New York City through an amendment to the New York City Administrative Code.

Bill No. Int 0140-2024 is the broadest and would ban all non-compete agreements in New York City. Although the bill does not specifically address agreements prohibiting employees from soliciting clients, its definition of a "non-compete agreement" may bring client non-solicits within the proposed law's reach. The bill defines a "non-compete agreement" as "an agreement between an employer and a worker that prevents, *or effectively prevents*, the worker from seeking or accepting work for a different employer, or from operating a business, after the worker no longer works for the employer." Numerous states have previously held that client or customer contact non-solicitation agreements are restraints of trade, akin to non-compete agreements, when they effectively prevent someone from soliciting or even accepting work from clients of a former employer on behalf of a new employer. Thus, non-solicitation agreements that essentially function as a "customer contact noncompete" might fall within the bill's proposed ban. If passed, the law would have retroactive effect as the proposed law requires employers to affirmatively "rescind" any pre-existing non-compete agreements by the law's effective date. California recently amended state law to similarly require employers to notify all current and some former employees with non-compete agreements of the fact that their agreements were void.

Bill No. Int 0146-2024 is narrower and would prohibit employers from entering into non-compete agreements with "low wage employees." The proposed law's definition of "low wage employees" excludes employees who are employed in a bona fide executive, administrative, or professional capacity and earn at least $1,300 per week. For non-low-wage employees, the law would require employers to disclose the potential non-compete requirement at the start of the hiring process. Several states, including Colorado and Illinois, require employers to make similar disclosures during the hiring process.

Bill No. Int 0375-2024 would prohibit hiring parties from requiring freelance workers to enter into non-compete agreements unless the hiring entity agreed to provide garden leave during the non-compete period. The bill states that the garden leave compensation must be “mutually agreed upon” and paid on either a bi-weekly or monthly basis. The proposed law broadly defines “freelance worker” as those hired or retained as an independent contractor to provide services in exchange for compensation. The only exceptions specified in the bill are certain sales representatives, attorney contractors, licensed medical professionals, and financial services professionals admitted to membership in the Financial Industry Regulatory Authority.

If passed, each bill would become effective 120 days thereafter.

Renewal of New York State Legislature's Efforts to Limit Non-Competes

Governor Hochul cited New York's “highly competitive economic climate” and the companies' “legitimate interests” in “retain[ing] highly compensated talent,” as reasons for vetoing the New York state legislature's proposed non-compete ban in December. Governor Hochul also signaled her desire to see a non-compete ban focused on protecting low and middle-income workers, which she described as workers earning less than $250,000. Numerous other states have passed similar laws setting, albeit lower, income thresholds.

The key sponsor of the vetoed legislation, State Senator Sean Ryan, has already expressed plans to introduce a revised bill later this year. The bill will almost certainly include an income threshold that is equal or close to the $250,000 threshold suggested by Governor Hochul.

Key Takeaways

The likelihood that New York City Council's proposed bills will pass is unclear at this juncture. Still, regardless of whether any of the New York City Council bills become law, the State of New York seems poised to again attempt passage of legislation limiting the use of covenants not to compete sometime this year. Kilpatrick's Labor and Employment attorneys will continue to monitor and report on this situation and its impact on New York employers.

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