Lowenstein Sandler

Employment Counseling & Litigation

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# BREAKING NEWS: New York State To Potentially Ban Post-Employment Noncompete Agreements

By Julie Levinson Werner and Amy C. Schwind

In a landmark, unprecedented move that will affect millions of employers across the state, the New York Assembly and Senate have passed a bill, which, if signed by Gov. Kathy Hochul, will ban employers from entering into post-employment noncompete agreements with employees, independent contractors, or essentially "any other person who, whether or not employed under a contract of employment, performs work or services" for the employer. The proposed law will take effect 30 days after the Governor signs it, and it will be applicable to contracts entered into or modified on or after the effective date.

If passed, the law will prohibit an employer, its agent, or the officer or agent of any corporation, partnership, limited liability company, or other entity from seeking, requiring, demanding, or accepting a noncompete agreement from any covered individual. The proposed law further clarifies that a "covered individual" is "in a position of economic dependence on, and under an obligation to perform duties for, that other person." A noncompete agreement includes any agreement or clause contained in any agreement between an employer and a covered individual that prohibits or restricts the individual from obtaining employment after the conclusion of employment with the employer. Furthermore, the proposed law provides that every contract by which "anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

Offering only a slight glimmer of consolation for employers, the bill does not prohibit an employer from entering into agreements for a fixed term of service, agreements protecting the disclosure of trade secrets or confidential and proprietary client information, or agreements prohibiting solicitation of clients that the individual learned about during employment, so long as the agreement does not "otherwise restrict competition." While the bill does not expressly address or include any exceptions for post-employment noncompetes in connection with a sale of a business as California's statute does, the definition of "covered individual" seems to suggest that the restriction would only apply to a service provider such as an employee or an independent contractor. Therefore, a logical reading of the proposed law would indicate it is limited to the employment context. However, it remains to be seen how a court will interpret it.

The bill provides a private right of action against employers for alleged violations, with available remedies of up to $10,000 in liquidated damages per affected individual and other possible relief, including voiding the noncompete agreement, enjoining the conduct of an employer, and receiving lost compensation, damages, and reasonable attorneys' fees and costs. A covered individual must bring the action within two years of the later of (i) when the prohibited noncompete was signed, (ii) when the individual learns of the prohibited noncompete agreement, (iii) when the employment or contractual relationship is terminated, or (iv) when the employer takes any step to enforce the noncompete agreement.

While in recent years some states have prohibited noncompetes for lower-wage workers or instituted other limitations, such as requiring an advance review period or severance for enforcement, this bill goes much further than any

law in the country in constituting a blanket ban on noncompetes, as defined, without exception. If passed, the bill will constitute a watershed change in New York noncompete law and will have a far-reaching impact on employers, the employment documents they use, and the post-employment restrictions they may impose.

Lowenstein Sandler's Employment Counseling & Litigation practice group is readily available to assist employers with this significant change in the law.

## Contacts

Please contact the listed attorneys for further information on the matters discussed herein.


**JULIE LEVINSON WERNER**
Partner
**T: 212.419.5864 / 973.597.2550**
jwerner@lowenstein.com

**AMY C. SCHWIND**
Counsel
**T: 973.597.6122**
aschwind@lowenstein.com





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