

# CLIENT ALERTS

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## Next Up: New York to Ban Non-Compete Agreements

### Client Alert

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New York is next in line to address non-compete agreements. We have previously reported on attempts to limit the use of non-compete agreements from the Federal Trade Commission, the General Counsel for the National Labor Relations Board, and the Michigan Legislature. Now, the New York legislature has stepped into the fray and passed a bill prohibiting non-compete agreements. If enacted as written, it would surpass even California's restrictions and those proposed by the FTC.

The bill, Senate Bill S3100A, bans all non-compete agreements, which it defines as any agreement that "prohibits or restricts such covered individual from obtaining employment, after the conclusion of employment with the employer included as a party to the agreement." The bill 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." By defining covered individual so broadly, the bill arguably prohibits non-competes with independent contractors and to sellers in the sale of business context, at least to the extent of prohibiting sellers from becoming an employee of a competing business.

The new bill also contains stiff penalties for employers. Covered individuals could bring a civil action against the employer or person(s) who violated this section. And the court could not only void the non-compete agreement, but also order appropriate relief including enjoining the conduct of any person or employer, ordering payment of liquidated damages (up to \$10,000), and awarding lost compensation, damages, reasonable attorneys' fees, and costs.

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If the bill were to be enacted into law as written, it would not prohibit employers entering into agreements with current or prospective covered individuals that:

- Establish a fixed term of service
- Prohibit disclosure of trade secrets, disclosure of confidential and proprietary client information
- Prohibit solicitation of the employer's customers that the covered individual learned about during employment, provided that such agreements are not so broad that they constitute a non-compete agreement

Unlike other non-compete bans, like the FTC's, if signed into law, the ban will only apply to agreements entered into or modified on or after the effective date, which is 30 days after it is signed by the Governor.

As it stands, various legal and industry organizations in New York are reaching out to the Governor's office to voice their discontent with the bill and correctly point out its many ambiguities. The New York Legislature however, still has not transmitted the bill to the Governor's desk. By December 31, 2023, the Governor could "call up" the bill for action or the Legislature could otherwise transmit it to the Governor. Once transmitted, the Governor has 10 days to act by either signing or vetoing it. If she does nothing, it becomes law. The bill could also be changed before becoming law and, as such, could become a compromise legislation allowing non-competes for employees who make a certain threshold and providing an express carveout for non-competes in the context of a sale of business.

Your Butzel Non-Compete and Trade Secret attorneys are at the ready to provide guidance on the impact of New York's non-compete bill if/when Governor Hochul signs it and will provide updates regarding any changes. If you have any questions about the New York non-compete ban or any other related issues, please contact your Butzel Non-Compete and Trade Secret attorney.

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