

Client Alert

A report
for clients
and friends
of the Firm August 2008

New York Law Now Prohibits Post-Termination Non-Compete Covenants for “Broadcast Employees”

On August 5, 2008, the Governor of New York signed into law the Broadcast Employees Freedom To Work Act (“new law”), to provide that certain non-compete agreements involving broadcast employees are void and unenforceable as against New York State public policy. The new law, which amends the state’s labor law, represents a major new statutory development in New York, which traditionally has left the enforceability of non-compete covenants to the courts. Several states, including, Arizona, Massachusetts, Maine and Illinois, have adopted similar laws, and other states (e.g. California) have general prohibitions on non-competition covenants. New York now joins this group, at least with respect to covered employees in the broadcast industry.

The Non-Compete/Trade Secrets Practice Group at Proskauer Rose LLP highlights for your attention the key provisions contained in the new law.

Key Provisions of the New Law

The new law has four simple sections and is intended to make post-termination non-compete covenants illegal for “broadcast employees” in the following manner:

- A “broadcasting industry employer”
- Cannot require as a “condition of employment, whether in an employment contract or otherwise”

- That a “broadcast employee” or “prospective broadcast employee”
- After the conclusion of employment
- Refrain from obtaining employment in any specific area, for a specified time or with any particular employer or in any particular industry.

The new law takes effect immediately but it does provide that it “shall not apply to preventing the enforcement of such a covenant during the term of an employment contract” (the “Permissible Non-Compete Period”) – more on that later. Any person who violates the law may be “civilly liable to a broadcast employee for damages, attorney’s fees and costs.” The new law also provides that its provisions cannot be waived.

Some Brief Legislative History

The new law raises a host of interpretative and practical questions; although the legislative history is sparse, a legislative memorandum relating to an earlier version of the law and related developments in the past indicate the following:

- Present statutory authority “is silent regarding covenants not to compete” and the new law provides that “certain non-compete covenants are void and unenforceable as against the public policy of this state.”
- “Employees in the broadcast industry are often required, as a condition of employment, to sign contracts limiting their future employment options, which are generally a restraint on the ability of employees to find work, and often require that employees move great distances to earn a living.”

- Under present law, “there is no freedom of contract and no negotiation for broadcast employees with regard to non-compete contracts.”

Earlier versions of the law have been proposed for a number of years, to protect broadcasters in small markets, primarily “upstate,” who have argued that they have suffered severe hardships as a result of their lack of bargaining power, and the limited mobility they have to find alternative employment in these markets.

This new law was the subject of lobbying by the American Federation of Television & Radio Artists (AFTRA) and other unions.

What It Means for a “Broadcasting Industry Employer”

The new law raises a host of questions/issues for covered employers – here is a list of questions to think about and review with counsel:

1. Geographical Coverage – “broadcast employees” working in New York State are covered – how much of a nexus do other employees need to have with New York State for coverage to apply?
2. “Broadcast Industry Employer” – this broad definition covers television stations or networks, radio stations or networks, cable stations or networks, internet or satellite-based services similar to a broadcast station or network, as well as (i) any “other entity” that provides broadcasting services, such as “news, weather, traffic, sports or entertainment reports or programming” and (ii) any broadcast entity “affiliated” with any covered employer. The scope of these “other entity” and “affiliated” provisions will have to be worked through. Does the reference to internet “services” apply to Google, YouTube and others?
3. “Broadcast Employee” – this broad definition picks up on-air and surprisingly, off-air employees, excluding management employees – what constitutes “management” will have to be parsed out. For example, will a news producer be considered management?
4. “Condition of Employment” – What does it mean to require a non-compete as a condition of employment? What if an employee forfeits equity or a deferred bonus if he or she voluntarily resigns and joins a competitor (which forfeiture would be permissible under New York’s “Employee Choice” doctrine). Is this approach now prohibited under the new law?

5. “Post-Termination Rights of First Refusal” – Employment agreements in the broadcast industry often give the company a post-termination “right of first refusal” to match offers an employee gets from a competitor after the term expires – is this limited right now an illegal non-compete type restraint under the new law?
6. What about notice or “Garden Leave” provisions that require advance notice of resignation – do they run afoul of the new law?
7. Immediate effectiveness – How does this new law affect existing agreements that were entered into prior to August 5, 2008, but whose non-competes are not yet “triggered”? With respect to these existing agreements, if an employee resigns mid-term, can the employer seek enforcement during the remaining “term of [the] employment agreement” (relying on the Permissible Non Compete Period provision). What about a new employment agreement entered into after August 5, 2008? – can the employer make the same argument, if the employee “walks” during the newly negotiated term?

These are just some of the questions that come to mind in reviewing this new law which employers will have to review with their counsel.

The Proskauer Rose Non-Compete and Trade Secrets Practice Group has extensive experience in addressing these and related issues in connection with virtually every type of non-compete, non-solicitation arrangement. If you have any questions about the new law, please feel free to contact any one of the attorneys who are listed below:

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If you have any questions about the impact of this new law, please contact your Proskauer relationship attorney or one of the attorneys listed below:

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