Proskauer

Update: New York State Senate Passes Another Bill With A Broad Ban on Non-Competes

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We recently reported on New York Bill No. S03100, which, if enacted, would broadly prohibit non-competition agreements in New York. On the same day, June 7, 2023, the New York Senate also passed Bill No. S6748 (the "Bill"), which would similarly prohibit non-competes. The Bill aims to prevent monopolies, monopsonies, and restraints on trade and classifies non-competes as unfair, anti-competitive business practices. *Id.* at § 8(2).

As in Bill No. S03100, the Bill would broadly ban non-compete agreements in New York and, notably, tracks verbatim the language used recently by the Federal Trade Commission in its proposed rule prohibiting most non-competes:

It is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.

Id. and Bill No. S6748, §8(2).

The “good faith basis” phrase in §8(2) of the Bill could seemingly conflict with the Bill’s initial total ban, as it implies that there might be circumstances where an employer could have a “good faith belief” as to the existence of an enforceable non-compete clause, despite the clear prohibition. While the N.Y. Senate doesn’t explain this apparent contradiction, the FTC’s Notice of Proposed Rulemaking (while not binding on the interpretation of a NY law) dispels that implication, explaining that the language (which the Bill copied) aims to protect workers from employer exploitation of workers’ lack of knowledge regarding state law enforcement of non-compete clauses by prohibiting employers from asserting that workers are subject to such clauses. The FTC further explains that the “good faith basis” addition seeks to align the restriction of employer speech with the First Amendment, meeting legal standards set by U.S. Supreme Court rulings in cases concerning false commercial messaging.

The Bill also would prohibit, like the FTC proposed Rule, contractual provisions that function as *de facto* non-competes, such as a non-disclosure provision “written so broadly that it effectively precludes the worker from working in the same field after the conclusion of the worker’s employment with the employer,” or terms that penalize departing employees by requiring them to pay back “training” fees, when the fees are not reasonably related to the actual cost of the training. S6748 at § 8(1).

Notably, if passed, the impact of this Bill would be retroactive and any existing non-compete agreements in New York would become invalid 180 days after the law’s enactment date. Employers would be required to rescind any such agreements and provide notice to current or former workers subject to the agreements. *Id.* at § 8(3). Like Bill No. S03100, to become a law, the Bill must make it through the New York Assembly and be signed into law by Governor Hochul. We will continue to monitor the status of both bills, either of which would lead to significant changes in New York’s restrictive covenant landscape.

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