Proskauer

New York's Non-Compete Bill: Cutting Through the Confusion

Law and the Workplace on **July 25, 2023**

The potential New York ban on non-compete agreements, approved by the both houses of the state Legislature back in June, has generated a significant volume of press, commentary, and speculation—but it hasn't yet been signed into law. What's the current status of the bill, and how would it impact existing non-compete agreements if and when it becomes law? Here's the bottom line, at least as of July 24, 2023.

Current Status of the Bill

The bipartisan bill, which passed the State Senate on June 7 and the Assembly on June 20, would impose the most sweeping restrictions on non-compete agreements passed in any U.S. state to date—a near-total ban on new non-compete agreements.

Does the Governor have the bill yet? After the Assembly passed the bill on June 20, it was referred back to the Senate, presumably to be readied for Governor Hochul's review and signature. But according to the most current information available from the Legislature, the bill has not yet been delivered to the Governor.

Is the Governor expected to sign the bill when she receives it? Multiple commentators have stated that Governor Hochul is expected to sign the bill. That said, there is no publicly available information that gives any indication as to what the Governor's intentions are with respect to the bill. In the past, Governor Hochul has supported limitations on non-compete agreements for low-wage employees. In 2022, she pledged to propose legislation to eliminate non-competes for workers earning below New York's median wage and to ban "no-poach" agreements under state antitrust law. But the current bill goes far beyond the low-wage restrictions the Governor previously supported, and her position on an outright ban on non-competes remains unclear.

What if the Governor doesn't act on the bill? Is that a "pocket veto," or does the bill automatically become law? The 2023 New York legislative session ended in early June, and the next session will not begin until 2024. In New York, if a bill is passed during the regular legislative session and then delivered to the Governor's desk, the Governor has ten days to sign the bill into law, veto the bill, or do nothing (in which case the bill becomes law without the Governor's signature). But this bill was passed during a special legislative session, after the regular legislative session had ended—so it is subject to a different process and timeframe. In this case, the Governor has 30 days to act after the bill is delivered to her. She can sign it into law, veto it, or do nothing (in which case such inaction is considered a "pocket veto"). Based on the votes cast during passage, it is unclear whether the Legislature would have enough votes to override a veto if the Governor fails to act on the bill within 30 days of receiving it.

What about "chapter amendments"? The Governor has another option regardless of when she receives the bill. She can propose "chapter amendments: a three-way agreement between the Governor, the Assembly, and the Senate to make changes to a bill (ostensibly for passage in the next legislative session.) We've heard speculation—but no proof—that the Governor may propose chapter amendments to allow employers to continue to enter into non-compete agreements with employees whose compensation exceeds a certain threshold.

Impact On Existing Non-Compete Agreements

Will the bill apply retroactively if signed into law? We believe the answer lies in the plain language of the bill. Section 3 of the bill states as follows: "This act shall take effect on the [30th] day after it shall have become a law [*e.g.*, the Governor signs it] and shall be applicable to contracts entered into or modified on or after such effective date." So if the Governor signs the bill this year, it will apply to non-compete agreements entered into or modified 30 days later (or thereafter). Under this plain reading of the law, it would not apply retroactively, and any agreements in place as of the 29th day after the Governor signs the bill would be unaffected by the new law and remain enforceable (to the extent otherwise enforceable under the common law).

We'll continue to monitor and report on further developments as they arise.

View original.

- **Allan S. Bloom**
  Partner