

June 2023

Follow @Paul\_Hastings



## *New York Legislature Passes Non-Compete Ban*

By [Marc Bernstein](#), [Kenneth Gage](#), [Emily Pidot](#), [Patrick Shea](#), [Sara Tomezsko](#), [Jennifer Baldocchi](#) & [Matthew Aibel](#)

On June 7, the New York Senate, by a vote of 40-21, passed a prohibition on non-compete agreements in a modified bill, 3100-A ("Bill"). On June 20, 2023 the New York State Assembly passed the Bill by a vote of 95-52. The Bill will be sent to Governor Hochul's desk and, assuming the Legislature adjourns, she will have 30 days to sign it. Should she fail to do so, the law will be subject to a pocket veto and will not become law.

Governor Hochul has not commented on the Bill and whether she supports it. In the past, the Governor has indicated her support for banning non-compete agreements, but only for certain lower-wage workers. For example, in 2022, the Governor announced her intention to "propose legislation to eliminate non-compete agreements for workers making below the median wage in New York State."<sup>1</sup>

If signed, the Bill would be codified in the New York Labor Law as Section 191-d. Like many legislative efforts toward the end of the session, the Bill is drafted in a way that may create confusion and lead to litigation regarding its interpretation. For example, the Bill defines a non-compete agreement as "any agreement, between an employer and a covered individual 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." Given that language, departing employees may argue that this ban would cover garden-leave or notice provisions—common terms in the financial services industry—where workers remain employed by the company but cease performing their role.

Under the proposed law, a "covered individual" includes employees as well as any person who "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." This might cover, for example, certain independent contractor relationships, or larger client relationships, depending on how the term "economic dependence" is interpreted.

The Bill also fails to include a specific exemption in the sale-of-business context. Non-compete provisions are regarded as essential in many such transactions to protect the goodwill the purchaser is buying. It is also common, and in some cases critical, to have the seller stay on to provide services after the closing. In such a case, the seller could argue that this new ban on non-competes applies. The Bill as drafted potentially leaves New York as an extreme outlier compared even to jurisdictions like California, which allow for non-competes in the sale-of-business context.

Language in the Bill indicates that it will not apply to *existing* non-competes. Specifically, the Bill states that it "shall take effect on the thirtieth day after it shall have become a law and shall be applicable to

contracts entered into or modified on or after such effective date.” But given the way the Bill is drafted and its legislative history, employees may argue to the contrary, noting that the Bill also provides that, “[e]very contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.” And despite the clear effective date language quoted above, the original sponsor’s memo to the Senate Bill mentions that the law “[v]oids current non-compete agreements.” Indeed, even as recently as a [May 16, 2023 op-ed](#), the bill sponsor, Sean Ryan, indicated that he believes the bill would “invalidate existing noncompete agreements and ban their future use.” So, employers can anticipate substantial future litigation on this point as well.

This lack of clarity in the Bill is all the more serious given the potential consequences employers may face if they guess wrong about the reach of the statute. The law grants covered individuals a two-year statute of limitation for claims, from the later of: (i) when the non-compete was signed; (ii) when the individual learns about the non-compete agreement; (iii) when the agreement or employment relationship is terminated; or (iv) when an employer takes steps to enforce a non-compete agreement. It also provides courts with enforcement powers to void non-competes, and award injunctive relief, lost compensation, damages, attorneys’ fees, and liquidated damages of up to \$10,000 for every covered individual.

As a small saving grace, the law makes clear that it does not impact a company’s ability to enter into an agreement that “prohibits disclosure of trade secrets, disclosure of confidential and proprietary client information, or solicitation of clients of the employer that the covered individual learned about during employment, provided that such agreement does not otherwise restrict competition in violation of this section.” Thus, confidentiality agreements and non-solicitation agreements of clients appear lawful under the Bill, although there still remains potential ambiguity about how the “does not otherwise restrict competition” exception may apply. And, as a practical matter, for many employers a simple confidentiality agreement may offer little protection against trade secrets being used by former employees at their new employer given the difficulty of both detecting and proving such misuse.

If the Bill becomes law, employers in New York may seriously have to consider relocating employees in sensitive positions to neighboring states outside New York that have not taken this extreme approach to non-competes. In the meantime, employers who use non-compete agreements should contact the Governor’s office concerning the benefits of non-competes in protecting trade secrets and customer goodwill as well as the potential pitfalls and ambiguities in the current Bill.

We will continue to monitor the Bill and apprise you of developments.

✧ ✧ ✧

*If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:*

**Los Angeles**

Jennifer S. Baldocchi  
1.213.683.6133  
[jenniferbaldocchi@paulhastings.com](mailto:jenniferbaldocchi@paulhastings.com)

**New York**

Marc E. Bernstein  
1.212.318.6907  
[marcbernstein@paulhastings.com](mailto:marcbernstein@paulhastings.com)

Patrick W. Shea  
1.212.318.6405  
[patrickshea@paulhastings.com](mailto:patrickshea@paulhastings.com)

Kenneth W. Gage  
1.212.318.6046  
[kennethgage@paulhastings.com](mailto:kennethgage@paulhastings.com)

Sara B. Tomezsko  
1.212.318.6267  
[saratomezsko@paulhastings.com](mailto:saratomezsko@paulhastings.com)

Emily R. Pidot  
1.212.318.6279  
[emilypidot@paulhastings.com](mailto:emilypidot@paulhastings.com)

Matthew Savage Aibel  
1.212.318.6934  
[matthewaibel@paulhastings.com](mailto:matthewaibel@paulhastings.com)

---

<sup>1</sup> <https://www.governor.ny.gov/news/governor-hochul-announces-comprehensive-plan-strengthen-new-yorks-workforce-and-help-grow>

**Paul Hastings LLP**

Stay Current is published solely for the interests of friends and clients of Paul Hastings LLP and should in no way be relied upon or construed as legal advice. The views expressed in this publication reflect those of the authors and not necessarily the views of Paul Hastings. For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought. These materials may be considered ATTORNEY ADVERTISING in some jurisdictions. Paul Hastings is a limited liability partnership. Copyright © 2023 Paul Hastings LLP.