

# New York Poised to Ban Non-Compete Agreements

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**Update: As of July 12, 2023, New York Governor Kathy Hochul has not signed into law the proposed non-compete ban. The proposed legislation has now been pending for over three weeks and a spokesperson from Governor Hochul's office recently stated that the Governor is "reviewing the legislation." The spokesperson did not provide any further detail but did point out that Governor Hochul has until December 31, 2023 to sign or veto the currently pending bill. The likely reason for the delay by the Governor in signing the bill, as well as the vague "reviewing the legislation" comment, is the Finance industry and other business associations actively (and strongly) lobbying the Governor to push for certain exceptions and caveats before signing the bill into law. For example, industry lobbyists have sought the addition of minimum compensation thresholds in lieu of an outright ban, limited applicability of a ban to only certain professions, and express carve-outs for non-competes entered as part of the sale of a business. Thus, there is still a long way to go before this bill, or more likely a version of this bill, is enacted.**

The New York State Legislature recently passed a bill that, if signed by Governor Kathy Hochul, will prohibit businesses from entering into post-employment noncompete agreements with employees, independent contractors, or any other workers.

In a special legislative session, on June 20, 2023, the New York State Assembly passed A1278B, which followed the New York State Senate's approval of Senate Bill 3100A on June 7, 2023. Governor Hochul is expected to sign the bill into law. The proposed law will take effect 30 days after the date of signature. The law will apply to contracts entered into or modified on or after the law's effective date.

If passed, New York will join four other states that have banned non-compete agreements: California, Minnesota, North Dakota, and Oklahoma.

## Broad Ban on Non-Compete Agreements with Workers

The proposed law will amend Section 191-d of the New York Labor Code to prohibit any non-compete agreement that restricts any person from obtaining employment or other type of engagement after the conclusion of the employment or engagement. The state legislature defined a "non-compete agreement" broadly as "any agreement, or clause contained in 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."

The definition of "covered individual" includes employees as well as independent contractors. "Covered individual" means "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.”

As noted above, the proposed law will apply to agreements entered into on or after 30 days after the date of the Governor’s signature. It appears that the proposed law is not retroactive and does not invalidate existing non-compete agreements entered prior to the effective date.

### Exceptions

The proposed law contains some express carve-outs that specify certain types of contracts that the law does not cover. Those contracts are:

- agreements with a prospective or current covered individual that establishes a fixed term of service;
- agreements prohibiting disclosure of trade secrets, confidential information, or proprietary information; and
- agreements prohibiting solicitation of clients of the employer that the covered individual learned about during employment.

The express carve-outs conclude with a vague qualification noting that any such agreement must not “otherwise restrict competition in violation of this section.”

Importantly, the proposed law does **not** contain an express carve-out for non-competes between a buyer and a seller in the sale of a business. However, the proposed law’s definition of “non-compete agreement” only discusses an agreement between an employer and a “covered individual,” so it is possible that a court could limit the scope of the law to the employment or quasi-employment context.

### Private Right of Action

The proposed law provides employees, contractors, and other workers with a private right of action in the event an employer presents them with an unlawful non-compete agreement or otherwise violates the proposed law. An aggrieved individual must file suit within two years of the later of: (i) the date of the signing of the non-compete; (ii) the date the employee or contractor learns of the non-compete agreement; (iii) the date employment or the contractual relationship is terminated; or (iv) the date the employer takes any step to enforce the non-compete agreement.

A court may invalidate any such unlawful non-compete agreement and order all appropriate relief, including injunctive relief (e.g., enjoining the conduct of any person or employer), damages for lost compensation, attorneys’ fees and costs, and liquidated damages up to \$10,000.

### What Should Employers Do?

Employers that employ workers in New York (or businesses that engage contractors in New York) should pay close attention to this proposed law and be prepared to refrain from using non-compete agreements in the very near future. In the event the Governor signs the law, employers should take

care to ascertain other methods of protecting their businesses, including lawful non-solicitation agreements and confidentiality agreements.

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**Benesch continues to monitor the status of this proposed law and will continue to issue periodic updates about the status of this legislation and other restrictive covenant proposals that are pending in state legislatures and Federal agencies. For more information, please contact:**

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