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Hochul Vetoes New York Noncompete Bill

New York's position on noncompete agreements is back in a state of flux. A bill banning virtually all noncompete agreements for workers in the state was approved by New York's legislature in June and delivered to Governor Kathy Hochul on December 12. Despite expectations that the governor might sign the bill, she vetoed it over the holidays.

The bill would have applied to all employers and most individuals, regardless of compensation level.[1] Prior to vetoing the bill, Hochul expressed reluctance to approve a blanket prohibition, instead stating that she favored a version of the bill that would protect "lower- and middle-income workers" while leaving noncompetes in place for high wage earners.[2] At one point, Hochul signaled an openness to an income cap on the ban that would exempt workers earning more than $250,000 from the law's reach.[3] In doing so, she noted New York's highly competitive economic environment and the legitimate business interests of companies to use noncompete agreements "to retain highly compensated talent."

In the final days leading up to the veto, state senators revisited the bill's language and offered modifications to entice Hochul to sign the bill. These offers, after "weeks of negotiation," reportedly arrived at a proposed $250,000 yearly income-based cap on the ban, which Hochul and the business community had initially considered earlier in 2023.[4] Given Hochul's veto, it is unclear whether her opinion on an income cap has changed. The bill's sponsor, Senator Sean Ryan, a Democrat, expressed his intention to reintroduce a version of the bill in the 2024 legislative session.[5] The current approach sets up a new debate that may likely focus on the appropriate salary cap for any ban on noncompete agreements.

If New York enacts any legislation limiting the use of noncompete agreements, it would join a number of other states that have adopted statutory limitations, including California, North Dakota, and Oklahoma, which maintain blanket bans on noncompete agreements.[6] Eleven other states and the District of Columbia have enacted statutory limitations on employers' use of noncompete agreements that forbid noncompetes for lower-wage employees.[7] These limitations vary substantially from state to state, with some imposing income thresholds and others imposing time limitations, among other things. For example, Washington, the District of Columbia, and Colorado measure income thresholds annually,[8] while Maryland, Nevada, and New Hampshire measure income on an hourly basis.[9]

While the status of legislation in New York plays out, it is important to note that the FTC's proposed noncompete ban is still under consideration. If approved, the FTC's proposed rule would create a federal nationwide prohibition on noncompete employment agreements.[10] The FTC proposed its rule on January 5, 2023, and the public comment period closed on March 20, 2023.[11] After a robust public comment period and spirited public debate, the FTC tabled its decision on a final rule and is not expected to take a vote on a final rule until at least April 2024.[12] Any rule that is announced is expected to face a number of immediate legal challenges.

Thompson Hine will continue to monitor any legislation affecting noncompete agreements and will issue alerts as developments occur with respect to any pending legislation or regulatory decision.

FOR MORE INFORMATION

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[1] *See* Senate Bill 2023-S3100A.

[2] Joshua Solomon, "Hochul Signals Desire to Preserve Noncompetes for High Earners," *Times Union* (Nov. 30, 2023).

[3] *Id.*

[4] Nick Garber, "Hochul Rejects Bill Banning Non-Compete Agreements, Siding with Businesses," *Crain's New York Business* (Dec. 23, 2023).

[5] *Id.*

[6] *See generally* Cal. Bus. & Prof. Code sec. 16600; N.D. Cent. Code sec. 9-08-06; Okla. Stat. Ann. tit. 15, sec. 219A. *But see* the fact that California law permits noncompete clauses in the limited circumstances that they are necessary to protect an employer's trade secrets, *see Muggill v. Reuben H. Donnelley Corp.*, 62 Cal. 2d 239, 242 (Cal. 1965).

[7] *See* 88 F.R. 3482, 3494 n.149 (Jan. 19, 2023).

[8] *See* Colo Rev. Stat. Ann. sec. 8-2-113(2)(a)-(b), as amended by H.B. 22-1317 (effective Aug. 10, 2022) (noncompetes apply to all except "highly compensated worker[s]," currently defined as individuals earning at least $101,250 annually, *see* Colo. Code Regs. Sec. 1103-14:1.2); DC Code sec. 32-581.02(a)(1) (effective Oct. 1, 2022) (where compensation is less than $150,000, or less than $250,000 if the employee is a medical specialist, employers may not require or request that the employee sign an agreement or comply with a workplace policy including a noncompete); Wash. Rev. Code Ann. sec. 49.62.020(1)(b) and 49.62.030(1) (effective Jan. 1, 2020) (noncompete clause is void and unenforceable unless worker's annualized earnings exceed $100,000 for employees and $250,000 for independent contractors, to be adjusted for inflation).

[9] Md. Code Ann., Lab. & Empl. sec. 3-716(a)(1)(i) (effective Oct. 1, 2019) (noncompete clauses are void where an employee earns equal to or less than $15 per hour or $31,200 per year); Nev. Rev. Stat. sec. 613.195(3) (effective Oct. 1, 2021) (noncompetes do not apply to hourly workers); N.H. Rev. Stat. Ann. sec. 275:70-a(II) (effective Sept. 8, 2019) (employers shall not require a worker who earns an hourly rate less than or equal to 200% of the federal minimum wage to enter into a noncompete clause, and noncompetes with such workers are void and unenforceable).

[10] 16 C.F.R. 910; 88 F.R. 3482.

[11] *Id.*

[12] Dan Papscun, "FTC Expected to Vote in 2024 on Rule to Ban Noncompete Clauses," Bloomberg Law (May 10, 2023).