

# Will Governor Hochul outright ban noncompetes in New York?

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Five months ago, both houses of the New York State Legislature passed a bill that would outlaw so-called “noncompete” agreements. The bill to ban noncompetes is now before Governor Kathy Hochul, who is deciding whether to sign or veto it. By state law, the governor has until December 31, 2023, to make that decision. If she signs the bill, New York would join a small, but growing number of states in the country that have banned or severely restricted noncompete agreements.

Noncompete agreements (noncompetes) prohibit an employee from working for a competitor or opening a competing business, typically for a certain period of time after an employee leaves a job. A noncompete may be one section of an employment contract or a standalone contract that an employee signs before or after employment begins.

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The bill passed by the Legislature several months ago (S. 3100-A/A. 1278-A) is about as clear as a statute can get when it comes to noncompetes. It states:

No employer or its agent, or the officer or agent of any corporation, partnership, limited liability company, or other entity, shall seek, require, demand or accept a noncompete agreement from any covered individual.

## The details

“Covered individual” is anyone who works for another “person” (an individual or company) in which that person is in a “position of economic dependence.” The legislation does not seem to contain an exception for noncompetes in contracts for the sale of a business, which is a common exception where noncompetes are almost always upheld.

For example, if a person sells his business to another business, it is customary and entirely reasonable for the selling owners be restricted from competing with the business they just sold (often for many millions of dollars). The legislation seems to leave that question up in the air, adding to uncertainty for the prospect of doing deals in New York.

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The bill banning noncompetes also would impose significant penalties on any business that tries to impose (or continues to impose) noncompetes on any of its employees. The bill allows any employee covered by a noncompete to sue the employer in court and seek an injunction restraining the enforcement of the noncompete, or a declaration that the noncompete is void.

A prevailing employee would then be permitted to seek to collect “reasonable attorneys’ fees.” In addition, a court can impose “liquidated damages” of \$10,000 on any employer that imposes a noncompete on its employees.

## Arguments

The lobbying on both sides of this issue has been intense, pitting the usual interests against each other: business groups (opposed to the bill) versus labor (in favor). In particular, the “labor” side, who feel that noncompetes tamp down wages artificially, argues that the bill would protect a wide range of employees and help boost the compensation of all employees.

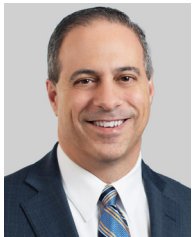
On the other side, business groups believe that outlawing noncompete agreements will negatively impact businesses’ hiring practices and will make it extremely difficult to retain employees.

Businesses may be very reluctant to make significant investments in employees or a business in general if presented with the threat that a highly compensated employee can just leave and compete with the business's competitor on a whim. Even the U.S. Federal Trade Commission (FTC) has weighed in by sending Governor Hochul a letter on November 28, 2023, urging her to sign the bill.

As we reported earlier this year, the FTC proposed adopting a rule that would ban noncompetes nationwide. That proposed rule is making its way through the rule-making process, but is sure to be legally challenged, if adopted.

Will Governor Hochul agree to an outright ban or will there be limitations placed on the bill? The governor has signaled that she may veto the bill, but would then seek a "compromise" that would limit the use of noncompetes to certain employees who make above a certain income threshold, most likely \$250,000.

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### Summary and conclusion

This bill, if enacted, will have a significant impact on employer and contractor agreements statewide. Once again, this development should provide an impetus for employers to revisit and review their employment agreements to ensure, if they use restrictive covenants and noncompetes, that they are carefully crafted and tailored to fit their needs and appropriate for the particular employee.

There are a variety of other protections that do not seem to be covered by this bill that every employer should consider using to protect their investments in their employees, trade secrets and proprietary information, and to guard against unfair competition. Wilson Elser has begun to implement them in creative ways in our clients' employment agreements. Employers will have to dramatically change their employment contracts in January should this bill pass, as the law would go into effect immediately.

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