

LITIGATION / LABOR AND EMPLOYMENT INFORMATION MEMO

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New York State Considers Ban of Non-Compete Agreements in the Shadow of the FTC's Proposed Nationwide Ban

On the heels of the Federal Trade Commission's (FTC) proposed nationwide ban on the use of non-competition agreements with employees and other "workers," the New York State Senate and Assembly are poised to consider a ban on the use of non-competition agreements within New York State.

On Jan. 13, 2020, members of the New York State Assembly introduced Bill No. A01278 seeking to "prohibit[] non-compete agreements and certain restrictive covenants" and authorizing "covered individuals to bring a civil action in a court of competent jurisdiction against any employer or persons alleged to have violated such prohibition." Members of the New York State Senate introduced an identical bill (S3100) on Jan. 27, 2023. On May 22, 2023, the proposed bill passed the Assembly's Labor Committee and just a day later it advanced from the Senate Committee on Labor.

The proposed legislation seeks to amend Article 6 of the New York Labor Law by adding a new Section 191-d banning non-compete agreements across the State. Proposed Section 191-d covers any person "who ... performs work or services for another person on such terms and conditions that they are ... in a position of economic dependence on, and under an obligation to perform duties for, that other person." Non-compete agreements are defined broadly under the proposed legislation to mean "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 including as a party to the agreement." As with the FTC's proposed regulation, this broad definition of a non-compete agreement raises concerns that more than just non-compete agreements would be banned under Proposed Section 191-d, including potentially broad non-solicitation agreements and non-disclosure agreements. While Proposed Section 191-d attempts to overcome this concern by stating "[n]othing in this section shall be construed or interpreted as ... relating to the ability of an employer to enter into an agreement with a prospective or current covered individual 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," the caveat that such agreements must "not otherwise restrict competition in violation of this section" gives cause for concern.

Violation of Proposed Section 191-d could bring steep penalties. Covered individuals are permitted to bring a civil action in any court of competent jurisdiction seeking an order voiding the non-compete agreement, enjoining enforcement of the non-compete agreement, and awarding liquidated damages as well as lost compensation, damages, reasonable attorneys' fees and costs. While liquidated damages are capped at \$10,000, each affected individual would be entitled to an award of liquidated damages in addition to any other remedies permitted by Proposed Section 191-d, i.e., actual damages, reasonable attorneys' fees and costs.

A floor vote has not yet been scheduled on the proposed bill to ban non-competes. Bond will be closely monitoring this situation and will provide updates on the continued progress of the bill.

For any questions about this issue, please feel free to contact [Bradley A. Hoppe](#), [Kevin G. Cope](#), any attorney in Bond's [litigation](#) or [labor and employment](#) practices or the attorney at the firm with whom you are regularly in contact.

