ARCHER & GREINER PC
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Client Advisory **July 2023**

New York Aims to Become the Fifth State to Join the Non-Compete "Ban" Wagon

The New York State Assembly reconvened last month and passed a bill (A01278B) banning all non-compete agreements which, if enacted, would prohibit almost all new employee non-compete agreements, regardless of salary level or job function. Strikingly, the proposed legislation does not contain an exception for situations involving the sale of a business. The law will be applicable to contracts entered into or modified on or after the law's effective date and does not void existing non-compete agreements. The bill and its Senate counterpart (S3100A) are currently in limbo, awaiting further action from New York Governor Kathy Hochul, who may request the bills be sent to her for execution, or instead request further amendments. If signed, the law would take effect 30 days thereafter.

Now, the particulars. If enacted, the bill would amend the New York labor law Section 191-d by adding the following provisions:

- Prohibit employers, corporations, partnerships, limited liability companies, and any other entities, from "seeking, demanding, or accepting" a non-compete agreement from any "covered individual."
- Make void any provisions in an applicable contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind.

The bill contains exceptions for the following:

- Fixed term contracts.
- Non-disclosure agreements.
- Client non-solicitation agreements with respect to clients that a covered individual learned about during employment (the bill is silent about employee non-solicitation agreements).

The bill creates a private cause of action against any employer or persons alleged to have violated this section within two years from the later of (i) when a prohibited non-compete agreement is signed; (ii) when the covered individual learns of the prohibited agreements; (iii) when the employment or contractual agreement is terminated; or (iv) when the employer takes any step to enforce the non-compete agreement. Reviewing courts would have jurisdiction to void violative agreements and enjoin violating employers, as well as to award liquidated damages (capped at $10,000) to "every covered individual affected," lost compensation, and reasonable attorney's fees and costs.

This bill is a seismic change in New York non-compete law, and is even more draconian than the Federal Trade Commission's proposed ban. The bill, however, also raises as many questions as it purports to answer. For instance, the bill bans non-competes for vague categories of workers defined as a "covered individual." The bill's language is confusing and raises many unanswered questions that will be left to the courts or to refinements by Governor Hochul and the Legislature. If you have any such agreements governed by New York law, we recommend that you consult with counsel before this law is enacted and continue to follow our coverage of these developments.

If you have any questions, please reach out to Christopher Terlingo in Archer's Trade Secret Protection and Non-Compete Group at cterlingo@archerlaw.com or 856-673-7150.