

---

# Hughes Hubbard & Reed

## New York State May Soon Put the Kibosh on Non-Competition Agreements

### Client Advisories

Hughes Hubbard & Reed LLP • A New York Limited Liability Partnership  
One Battery Park Plaza • New York, New York 10004-1482 • +1 (212) 837-6000

Attorney advertising. Readers are advised that prior results do not guarantee a similar outcome. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. For information regarding the selection process of awards, please visit <https://www.hugheshubbard.com/legal-notices-methodologies>.

---

**June 27, 2023** – The apparently inexorable march against non-competes took another step last week. On June 20, 2023, the New York State legislature approved new Labor Law Section 191-d (the “NY Non-Compete Law”) which would generally prohibit the use of non-competition agreements in New York. Below is a Q&A regarding the NY Non-Compete Law as approved by the New York State legislature.

### **Is the NY Non-Compete Law now in effect?**

The NY Non-Compete Law will not become effective unless and until it is approved by Governor Kathy Hochul. If she approves the bill, the law will become effective 30 days after she signs it. While the governor has said she is in favor of some form of non-competes legislation, particularly to protect low-wage earners, she could veto the bill in the form approved by the legislature or require amendments or clarifications to the bill prior to signing it. Interested parties are lobbying for changes to the bill. We also note that there are other forms of non-competes legislation pending in the New York State legislature.

If Governor Hochul vetoes the bill, the legislature could (and may have sufficient votes to) override the veto and approve the NY Non-Compete Law in its current form, and the law would become effective 30 days after the legislature overrides the veto.

### **If the NY Non-Compete Law becomes effective, will it apply prospectively or retroactively?**

The NY Non-Compete Law will apply prospectively to agreements that are entered into or that are modified on or after the date the law becomes effective. The law will not apply to an agreement that was entered into prior to the date the law becomes effective unless the agreement is modified.

### **What does the NY Non-Compete Law prohibit?**

The NY Non-Compete Law has two restrictions.

The first restriction prohibits employers and entities (in whatever form) and their officers and agents from seeking, requiring, demanding or accepting a “non-compete agreement” from any “covered individual”. Below, we refer to this part of the law as a “Prohibited Non-Compete.”

The second restriction, while not a per se prohibition, would void any provision in a “contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind.” This part of the law could be read to void any non-competition provision whether or not the provision applies in the employment context, and may apply to void a non-compete provision that is agreed to by sellers of a business, or to void non-competes agreed to by independent contractors and partners. Below, we refer to this part of the law as a “Void Non-Compete.”

### **What “non-compete agreements” are Prohibited Non-Competes under the NY Non-Compete Law?**

The NY Non-Compete Law broadly defines a “non-compete agreement” to include “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” termination of employment. This definition covers any provision that expressly prohibits competition after termination and, while unclear, may also prohibit other forms of employer protections including garden leave provisions (where the individual remains employed – and therefore cannot compete – but is prohibited by the employer from providing active services) and employee choice provisions (a provision that permits an employee to choose between competing or receiving compensation).

### **Are any forms of employer protection specifically permitted under the NY Non-Compete Law?**

The NY Non-Compete Law states that it should not be “construed or interpreted as affecting any other provision of federal, state, or local law, rule, or regulation relating to the ability of an employer to enter into” agreements that (i) are for a fixed period of service, (ii) prohibit disclosure of trade secrets or confidential and proprietary client information, or (iii) prohibit solicitation of clients that the employee learned about while employed. Although the lead-in to the listed contracts makes it unclear, this provision is generally being interpreted to mean that fixed term contracts, protection of trade secrets and client non-solicits are permitted under this law, provided the agreement does “not otherwise restrict competition in violation of this” law.

Notably, the listed exceptions do not address whether agreements providing for non-solicitation of employees are permitted, and they do not provide an explicit exception for non-competes that are entered into in connection with the sale of a business.

### **Who are the “covered individuals” protected by the Prohibited Non-Compete portion of the NY Non-Compete Law?**

The NY Non-Compete Law defines a “covered individual” broadly as any “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.” This definition encompasses common law employees and may include other service providers, such as partners and gig workers, if they provide services “for another person” and are “in a position of economic dependence on, and under an obligation to perform duties for, that other person.” While not clear from doubt, the definition seemingly does not apply to independent contractors and significant partners and business owners who are in business for themselves and not economically dependent upon or obligated to perform services for another person.

### **Does the NY Non-Compete Law apply in connection with the sale of a business?**

The NY Non-Compete Law is unique for its lack of an express exception for a sale of business. Even California, which has been held as a beacon for long prohibiting non-compete clauses, and the Federal Trade Commission, which recently proposed a non-compete ban, have exceptions for the sale of a business.

Certain equity owners, including significant shareholders and partners, may not fall under the definition of “covered employees” because such individuals do not perform services for “another person” and are not “in a position of economic dependence on, and under an obligation to perform duties for” another person. Accordingly, the Prohibited Non-Compete portion of the NY Non-Compete Law may not impose a per se prohibition (and liability) on businesses from entering into non-compete agreements with such individuals in the context of the sale of a business or otherwise.

However, as discussed above, the Void Non-Compete portion of the NY Non-Compete Law is broader and may apply to any person, whether or not a “covered individual”. This provision of the law may therefore void a non-compete that is agreed to by a seller of a business.

### **What happens if an employer violates the Prohibited Non-Compete portion of the NY Non-Compete Law?**

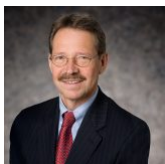
The NY Non-Compete Law gives an employee a private right of action against an employer for violations of the Prohibited Non-Compete portion of the law, provided the employee brings the action within a two-year statute of limitation period that ends the later of: (i) when the non-compete agreement was entered into (ii) when the employee learns of the non-compete agreement (iii) when the service relationship is terminated or (iv) when the employer tries to enforce the non-compete provision. In a typical employment scenario, this statute of limitations period is largely window-dressing given that non-compete provisions rarely extend beyond two years from termination of employment.

A court may void any non-compete agreement and may award other “appropriate relief.” The “appropriate relief” includes liquidated damages of up to \$10,000, and could include other relief as well, such as enjoining the conduct of any person and awarding lost compensation (which may include compensation that would have been earned from a prospective employer), damages, reasonable attorneys’ fees and costs.

### **What can employers do to protect themselves in light of the NY Non-Compete Law?**

- Employers who are currently contemplating entering into a non-compete agreement may consider doing so prior to the effective date of the NY Non-Compete Law so as to avail themselves of any grandfather relief.
- However, whether or not the NY Non-Compete Law becomes effective, non-compete agreements are facing very stiff headwinds at both the federal and state level (and outside the United States). Therefore, employers who do try to enter into a non-compete agreement in New York before the NY Non-Compete Law becomes effective should make sure that they carefully tailor the non-compete provisions to be reasonable in geographic scope, temporal scope and restricted activity, and they should avoid applying such provisions to rank-and-file employees.
- In addition, businesses should review the non-compete clauses in their form contracts and consider how those provisions may need to be modified if the NY Non-Compete Law becomes effective, and the ancillary impact such modifications may have (such as on compensation arrangements).
- In all events, businesses should ensure that they have other protective provisions in place, such as protection of trade secrets and intellectual property, confidentiality provisions and non-solicitation provisions.
- When negotiating the choice-of-law provision in an agreement to purchase a business, buyers should consider a jurisdiction that is more favorable with regard to non-compete agreements than New York State.

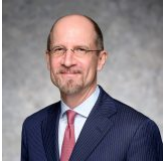
## **Related People**



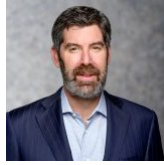
**Spencer L. Harrison**



**Amina Hassan**



**Robb W. Patryk**



**Charles A. Samuelson**



**Charles Wachsstock**



**Erin E. DeCecchis**

## **Related Areas of Focus**

Corporate Governance

Employment & Unfair Competition