

New York Restrictive Covenant Update

By David E. Schwartz, Emily D. Safko

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In recent years, several states have enacted statutes banning or significantly limiting an employer's ability to require an employee to enter into a covenant not to compete. On Feb. 10, 2025, Sen. Sean Ryan introduced a bill (S4641) that, if enacted, would put New York in that category. On June 9, 2025, the bill passed the Senate and was delivered to the Assembly. The bill would ban covenants not to compete other than those pertaining to highly compensated individuals and would require that an employer continue paying the former employee's salary during any period of enforcement. In 2023, Ryan introduced a bill that would have banned covenants not to compete in New York entirely, but Gov. Kathy Hochul vetoed the bill in December 2023. Now, he is taking a second swing.

Ryan's bill, if enacted, would ban employers from seeking, requiring, demanding or accepting a covenant not to compete from any employee or health-related professional who is a resident of New York or who is employed in New York other than "highly compensated individuals." The bill defines a highly compensated individual as any individual whose average annualized rate of cash compensation during the past three years is equal to or greater than \$500,000, which



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amount shall be adjusted each year beginning in 2027 based on any increase in the Consumer Price Index for all Urban Consumers for New York state. Notably, the bill would require that an employer pay the highly compensated employee a salary during any period of enforcement of the covenant not to compete.

In addition to these limitations, any covenant not to compete entered into with a highly compensated individual who is not a health related professional must also meet the requirements for a valid covenant not to compete under the common law of New York. Specifically, the covenant must be reasonable as to time (which the bill provides can be no longer than one year), geography and scope, it cannot impose an undue hardship on the employee or

harm the public, it must protect the employer's legitimate interests and it cannot be greater than necessary to protect the employer's legitimate business interests.

As with the statutes in several other states, a choice of law or choice of venue provision designating a state other than New York will not be enforceable if the individual was a resident of New York or employed in New York in the 30 days prior to the termination of the individual's employment. Employers would also be required to post notice of employees' rights with respect to covenants

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not to compete in an easily accessible and customarily frequented location.

The bill includes certain exceptions. Specifically, the bill would not apply to covenants not to compete entered into in connection with the sale of a business or the sale or disposition of a majority of an ownership interest in a business for any partner of a partnership or member of a limited liability company owning at least 15% interest in such partnership or limited liability company or any person or entity owning 15% or more ownership interest in a business. The bill also makes clear that it does not apply to agreements providing for a fixed term or exclusivity during employment, prohibiting disclosure of trade secrets and confidential

and proprietary client information or limiting solicitation of clients.

As to enforcement, the bill provides covered individuals with a right of action for violation of the statute, which shall be brought within two years of the later of: when the agreement was signed; when the covered individual learned of the covenant not to compete; when the employment or engagement is terminated or when the employer takes any step to enforce the prohibited agreement. Upon finding a violation, the bill empowers a court to void the agreement and to award all available relief, including issuing an injunction, ordering payment of liquidated damages up to an amount of \$10,000 and awarding lost compensation, compensatory damages, reasonable attorney fees and costs. The bill does not apply retroactively or void existing covenants not to compete.

Having passed the Senate on June 9, 2025, the bill was delivered to the Assembly Labor Committee for consideration. If approved by the Labor Committee, the bill will go before the full Assembly for a vote. For now, the landmark case, *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382 (1999), and its progeny govern the enforceability of non-competition covenants in New York. Generally, under *BDO Seidman*, a restrictive covenant in an employment agreement "is reasonable only if it: is no greater than is required for the protection of the legitimate interest of the employer, does not impose undue hardship on the employee, and is not injurious to the public." New York courts have recognized the following four legitimate interests: protection of trade secrets; protection of confidential customer information; protection of the employer's client base, and protection from competition when an

employee's services are unique or extraordinary. See *BDO Seidman*, 93 N.Y.2d at 389, 392; *Ticor Title Insurance v. Cohen*, 173 F.3d 63, 69-70 (2d Cir. 1999).

Recent case law suggests that New York courts may find a noncompetition covenant that prohibits an employee from working for a competitor in any capacity and in a noncompetitive line of business to be overbroad and unenforceable. See *Flatiron Health v. Carson*, No. 19 CIV. 8999 (VM), 2020 WL 1320867, at *21 (S.D.N.Y. Mar. 20, 2020); *Magtoles v. United Staffing Registry*, 665 F. Supp. 3d 326, 348 (E.D.N.Y. 2023). Notably, the bill makes it clear that any permissible covenant not to compete with a highly compensated individual would still need to meet these common law requirements.

Importantly, the enactment of the bill would not affect the enforceability of customer and employee nonsolicitation agreements under New York law. The reasonableness test articulated in *BDO Seidman* applies to both customer and employee non-solicits.

As to customer non-solicits, the covenant may not prohibit an employee from soliciting clients or customers with whom or which the employee had a business relationship prior to his or her current employment. See *BDO Seidman*, 93 N.Y.2d at 392. In other words, the covenant may only prohibit an employee from soliciting clients or customers with whom or which the employee developed a relationship through his or her employment with the employer. Notably, in *Flatiron Health*, 2020 WL 1320867, at *23-24,

the court declined to partially enforce a non-solicitation covenant when it did not comply with this principle from *BDO Seidman*.

As to employee nonsolicits, they are permissible so long as they are tailored to protecting a legitimate interest. However, protecting or stabilizing a workforce is not a legitimate employer interest under New York law. Rather, an employee non-solicit is only enforceable to the extent it is tailored to protect against the "misappropriation of the employer's trade secrets or of confidential customer lists" or "competition by a former employee whose services are unique or extraordinary." See *BDO Seidman*, 93 N.Y.2d at 389. New York courts have therefore found that an employee non-solicit is generally overbroad where it prohibits solicitation of all employees of an employer "without regard to what type of role the employee holds, what type of skills they possess, or their value to the employer." See *Permanens Capital v. Bruce*, No. 21-CV-10525JSRRWL, 2022 WL 3442270, at *9 (S.D.N.Y. July 22, 2022).

Employers should monitor developments with respect to the bill in New York. In the meantime, employers should take note of the increased scrutiny of restrictive covenants in New York—and elsewhere—to ensure compliance with the evolving landscape governing their enforceability.

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