# Hearing on the Governor's Budget

## January 31, 2022

I am Wayne N. Outten, Co-chair of the Non-Compete Subcommittee of the Legislative Committee of the New York affiliate of the National Employment Lawyers Association (NELA/NY). NELA/NY is an organization of about 350 lawyers who primarily represent employees.

I have been representing employees, for more than forty years. I am the founder, former Managing Partner, and Chair of Outten & Golden LLP, a law firm of more than 50 lawyers that focuses exclusively on representing employees. I am here to speak about a very serious issue facing hundreds of thousands of employees in New York: unreasonable and harmful non-competition restrictions that impair the ability of employees to change jobs and to improve their compensation.

### The Governor's Proposal

Governor Hochul included in her budget a bill to limit non-competition agreements. In short, her bill would prohibit non-competition restrictions for any employees earning less that the "median wage"; and for employees earning more than that threshold, her bill contains limits on the duration and nature of such restrictions.

NELA/NY strongly supports such legislation – in fact, it is long overdue - but we believe that the Governor's bill does not go far enough.

**Existing New York Law on Non-competition Agreements**

Under existing New York common law, employers are free to impose non-competition restrictions on employees if the restrictions advance the employer's "legitimate protectible interest" in confidential or proprietary information and the restrictions are reasonable in time, scope, and geography. Under these standards, non-competition agreements have become common in New York – they are "standard operating procedure" in many industries, including the financial services industry. Notably, these standards do not necessarily take into account the specific role and responsibilities of the subject employee or the employee's limited or non-existent access to protectible information. Furthermore, New York employers typically require most, if not all, employees (regardless of role) to sign non-competition agreements upon hiring, and such agreements are typically drafted to apply in the broadest possible fashion.

New York law does NOT limit such restrictions only to highly compensated employees or to senior executives. Thus, all low, moderate, and middle-income employees – as well as highly compensated employees - are subject to such restrictions. Moreover, New York law does NOT require an employer to pay the employee during the restricted period. As a result, the employee is required to bear the cost of the restriction even though it is crafted to benefit the interests of the employer. Perhaps most egregiously, New York courts have enforced such restrictions even when the employer terminated an employee's employment without cause.

**The Adverse Impact of Existing Law**

Such laws have a major adverse impact on the New York economy - as well as on the interests and rights of New York employees.

As is common knowledge, companies like to limit the ability of other companies to compete in the market place if they can get away with it. We already have in place many laws that restrict such anti-competitive activities, including antitrust statutes, fair competition laws, and consumer protection laws; but those laws do not apply to non-competition restrictions imposed on employees by employers. As described below, many states – such as California - have long recognized that such restrictions on employees are unwarranted and unnecessary restrictions on legitimate competition that cause great harm to the economy and to employees.

Obviously, such restrictions severely limit the mobility of employees. Employees may be literally unemployable in their chosen careers for a year (sometimes even longer) – unable to earn money to support themselves and their families and without any compensation from their former employers during the restricted period – with no recourse. They risk being sued by their former employers if the former employers think they are engaged (or plan to be engaged) in competitive activity, even if unrelated to the former employee's prior job and even if the former employer cannot show any major harm.

Of course, most employees cannot bear the risk (and expense) of being sued and enjoined from starting a new job. As a result, they are intimidated into either staying with the job they have or being unemployed after leaving the job. In either event, the adverse impact on employee mobility and on employees' livelihoods is substantial. For example, as just one of the thousands of egregious examples that we see in our practices, one of our members recently was called to assist an employee who worked for a private employer that provided services to disabled

children; the employee was forced to sign a noncompete that barred her from providing services to any autistic child in three New York City counties after she left employment.

In addition, such restrictions impair the ability of employees to negotiate better employment opportunities and better compensation from their employers or from prospective employers. Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements*, Economic Policy Institute Economic Policy Institute (Dec. 10, 2019), https://www.epi.org/publication/noncompete-agreements/. Indeed, prospective employers are often unwilling to consider hiring employees subject to non-compete agreements due to the potential litigation risk and the desire not to wait lengthy periods for such employees to become available.

As a result, an employee subject to a restriction on employment elsewhere – especially in the employee's field of expertise or experience - has a substantially reduced ability to negotiate for improved compensation and benefits from the existing employer; employers use this leverage to suppress compensation of their employees. See generally, John W. Lettieri, *Noncompete Agreements and American Workers – Testimony before the Senate Committee on Small Business*, Economic Innovation Group (Nov. 14, 2019), https://eig.org/news/testimony-before-the-senate-committee-on-small-business-noncompete-agreements-and-american-workers. Further, an employee seeking new employment is at a serious disadvantage in negotiating terms and conditions of employment when the employee is precluded from engaging in competitive activities for a significant period. Even if a prospective new employer is willing to consider hiring such a person, the employee's ability to negotiate is dramatically reduced.

Finally, because of such restrictions, many employees cannot support themselves and their families during restricted periods, given that employers are not required to compensate

former employees during such periods. Such employees are forced to live off savings (if they have savings), to borrow from family and friends, and/or to live off unemployment benefits.

## What Other Jurisdictions Have Done

On July 5, 2021, President Biden issued an Executive Order on Promoting Competition in the American Economy that encourages the Federal Trade Commission to ban or limit the use of non-competes.[1] In addition, the bipartisan Workforce Mobility Act and the Freedom to Compete Act were introduced in 2021 to prevent the enforcement and creation of non-competes.[2]

There is also growing movement to ban non-competes on the state level. State laws that ban non-competes generally fall within one of three categories: (1) elimination of non-competes for everyone; (2) elimination of non-competes for some employees based on occupation or income level; or (3) codifying stricter requirements in enforcing them.[3] Some examples of states that have passed progressive bans on non-competes include California, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Hampshire, Oregon, and Washington.[4] There is a need for progressive and strong laws banning and restricting non-competition agreements because otherwise employees can be subjected to these coercive agreements as employers seek to get around weak restrictions.

Here are some specific examples of recent state statutes:

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[1] White House, Fact Sheet: Executive Order on Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

[2] The Workforce Mobility Act, S. 483/H.R. 1367 (117th Cong. 2021); Freedom to Compete Act, S. 2375 (117th Cong. 2021).

[3] Charles A. Sullivan, *Non-Competes in a Downsizing World*, 8 SAN DIEGO L. REV. 677, 681 (2021).

[4] *See e.g.,* CAL. BUS. & PROF. Code § 16600; CT St 42-110b (2019); Illinois Freedom to Work Act, 820 ILCS 90/10 (2017); Maine, 26 M.R.S.A. § 599-A (2019); MD CODE, LAB & EMP., § 3-716 2019 (2019); Massachusetts Noncompetition Agreement Act, MA st 149 s 24L; NH ST § 275:70 (2019); OR. ST. 653.295 (2020); WASH ST. 49.62.020 (2020).

- As discussed above California, North Dakota and Oklahoma ban noncompetes altogether. https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=BPC§ionNum=16600.: https://www.legis.nd.gov/cencode/t09c08.pdf, https://law.justia.com/codes/oklahoma/2014/title-15/section-15-219a#:~:text=A%20person%20who%20makes%20an,that%20conducted%20by%20the%20former.

- Washington DC banned noncompetes for all workers, except medical professionals making over $250,000 a year.

- Since 2020, Oregon employers are required to present non-competes before an offer of employment, and non-competes are limited to workers making above $100,533, an amount that goes up annually.

- Other states have enacted statutes limiting non-competes for certain categories of employees or for certain industries, e.g., New Mexico and Hawaii. http://www.capitol.hawaii.gov/session2015/bills/HB1090_CD1_.htm

**Possible Solutions**

As the foregoing indicates, the solutions range from complete bans on non-competition agreements, to almost complete bans, to income thresholds for allowing such agreements, and to substantial restrictions on when and how such agreements can be enforced.

Our view is that a complete ban on non-competition agreements is the best solution. Such a ban will allow for fairer competition among employers for talent, will promote mobility for employees, and will allow employees to negotiate for their services on a level playing field. The experience in California – the sixth largest economy in the world - has proven the benefits of this approach. Employee mobility and fair competition for talent has fostered exceptional economic opportunities there, as illustrated by Silicon Valley.

Employers may contend that they need non-competition restrictions to protect their confidential and proprietary information. But using such restrictions for that purpose is like using a meat cleaver when a scalpel will do the job. Employers already routinely require employees to sign confidentiality agreements to protect such information. Responsible employers in New York accept and respect such agreements of other companies; in fact, many employers require prospective employees to disclose any such confidentiality agreements and require new employees NOT to disclose or use during their employment information of another company that is confidential or proprietary. We understand and respect such practices. And such practices have served employers – and the economy – well in other jurisdictions.

In addition, a complete ban reduces confusion, risk, and expenses for the entire economy. Employees do not need to worry about where the lines are drawn that restrict their re-employment, and employers do not need to spend money on imposing, negotiating, enforcing, and litigating non-competition issues.

In our view, the only alternative to a complete ban is to create a very high income threshold that permits restrictions on competition only for very highly compensated employees, such as those earning more than $500,000 in cash compensation per year. Such a threshold would free the overwhelming majority of New Yorkers from the tyranny of non-competition agreements. Even if a high-income threshold approach is adopted, the non-competition agreements that are allowed should be subject to strict restrictions and conditions, including a requirement that the employer pay the employee during the restricted period.

In any event, any new non-compete law should have effective enforcement provisions to discourage employers from over-reaching (e.g., injunctive relief and substantial damages) and to

protect employees who are threatened with the enforcement of non-competition restrictions (e.g., attorneys' fees).