

NEW YORK STATUTE BARS NON-COMPETITION PROVISIONS IN THE MEDIA INDUSTRY

On August 6, 2008, New York Governor David A. Paterson enacted a new statute which prohibits a broadly defined group of media industry employers from requiring or seeking to enforce post-employment non-competition provisions. The statute, known as the "Broadcast Employees Freedom to Work Act" (the "Act"), marks the first time that New York has had a statute regulating the use of non-competition provisions. See N.Y. LAB. LAW § 202-k (2008). The Act could potentially affect various aspects of talent contract negotiations in certain of the New York-based media industries and give rise to a host of legal issues relating to the meaning and scope of this new prohibition.

The Act provides that affected employers "shall not require as a condition of employment, whether in an employment contract or otherwise" that any affected employee or potential employee "refrain from obtaining employment . . . after the conclusion of employment with such . . . employer" either "(A) in any specified geographic area; (B) for a specific period of time; or (C) with any particular employer or in any particular industry." Accordingly, the Act would most certainly prohibit the use of post-employment non-competition provisions by affected employers. It is important to note, however, that the Act applies only to post-employment non-competes and "shall not apply to preventing the enforcement of such a covenant during the term of an employment contract."

The law broadly applies to any "broadcasting industry employer", which includes:

- "television stations or networks";
- "radio stations or networks";
- "cable stations or networks";
- "internet or satellite-based services similar to a broadcast station or network";
- "any broadcast entities affiliated with any of the employers of this paragraph"; and
- "any other entity that provides broadcasting services such as news, weather, traffic, sports, or entertainment reports or programming."

While the new law applies to both "on-air" and "off-air" employees, it expressly excludes "management employees." In addition, the Act does not contain any limitations based on the functions performed by employees. Thus, for example, the Act does not exclude sales employees, a job function that is often subject to non-competes and other restrictive covenants under New York's common law.

The prohibition on these post-employment restrictions "may not be waived, and any clause, covenant or agreement to waive such prohibition shall be null and void and may not be enforced against the parties in any court or other jurisdiction." The Act also authorizes civil actions for damages by employees, including attorneys' fees and costs, who believe their rights have been violated.

Although the Act seeks to prohibit the use of post-employment non-competition provisions, it does not restrict the use of post-employment non-solicitation clauses or similar provisions that attempt to protect customer and employee relationships. Likewise, the Act places no limits on confidentiality provisions, forfeiture provisions and/or other forms of restrictive covenants that do not expressly prohibit competition. Finally, the Act does not seek to regulate any employment requirements during the term of an employment agreement. For example, notice periods, exclusive negotiation periods, rights-of-first-refusal, rights-of-last-refusal, pay-or-play provisions, and other contractual provisions that govern the end or extension of an employment relationship during the term of the contract should not be affected by the Act.

In light of this new statute, media employers will be required to review and perhaps revise their forms of employment and service agreements. Any express, post-employment non-compete clause found in such agreements may need to be deleted while other restrictive covenants, like non-solicitation provisions, will require bolstering in order for affected employers to maintain their competitive advantage.

If you would like to discuss the details of the Broadcast Employees Freedom to Work Act, or to discuss other labor and employment matters facing your company, please contact:

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