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## **New York Nixes Non-Competes** **Impact on in-place pacts unclear**

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In early August, New York enacted a state-wide ban on non-competition provisions in broadcast employment contracts. By doing so it joined a handful of other jurisdictions (Arizona, Connecticut, Illinois, Maine, Massachusetts, the District of Columbia) that target the broadcast industry with statutes to either limit enforcement of or completely ban contract clauses in employment agreements between broadcasters and their employees that would otherwise prevent the employees from subsequently working for competitors. California generally bans enforcement of all non-competition agreements against employees in all industries.

The New York statute was successfully passed this year after at least two prior attempts failed in 2004 and 2006. It was heavily promoted by labor unions, particularly local chapters of the AFTRA and NABET-CWA with support from the New York State AFL-CIO. Although New York City has one of the largest concentrations of media industry employers and employees, most of the pro-employee support for this legislation appears to have originated upstate, with the Rochester and Buffalo local chapters getting particular credit in union press releases. Apparently, television and radio station employees in those smaller markets were the ones who felt that overly-restrictive non-compete agreements were being forced upon them by local broadcasters. AFTRA is aggressively pursuing passage of similar legislation in other states.

Interestingly, the New York law applies not only to traditional radio and television stations, but more broadly to any “broadcast employer”, a term which includes networks (cable and broadcast), internet or satellite-based services similar to a broadcast stations, and any other entity that provides broadcasting services such as news, weather, traffic, etc. On the other side of the equation, the term “broadcast employee” includes on-air *and* off-air employees, but *not* management employees. The law leaves vague exactly who might be deemed a “manager”, so we can expect litigation to bring that question into focus. In a similar vein, it’s not clear whether the law applies to independent contractors or freelancers.

Perhaps the biggest question, at least initially, is whether the statute makes non-compete clauses in existing contracts void and/or unenforceable. The New York statute merely states that after the date of its enactment, a broadcast industry employer may not require, as a condition of employment, that a broadcast employee agree to refrain after the employment period has ended from obtaining other employment within a specified geographic area, for a specific period of time, or with a particular other employer or in any particular industry. In simple terms, this seems to be a ban upon entering into new non-compete agreements.

But what if an employee had agreed to (and had presumably been compensated for) such a provision in a contract signed before the law's enactment? Arguably, that prior contract provision might still be enforceable. Indeed, a new law which renders illegal contractual provisions which were legal when entered into might raise significant constitutional questions. So it might be a little premature for anyone subject to a pre-existing non-compete to celebrate any new-found freedom.

One aspect of the new law in New York that should grab the attention of broadcasters is that any person violating the new law is civilly liable to its employee for damages, attorney fees and costs. Plaintiffs' lawyers in New York representing employees have doubtless made note of that provision. There is nothing in the new law that defines how such damages are calculated, so we can expect enterprising attorneys to come up with all sorts of creative ways to show how their clients are entitled to multi-million dollar awards under the new law.

The new ban on new non-competes in New York – and similar efforts in other jurisdictions – highlights the need to have a local lawyer familiar with relevant state employment statutes review and approve any new or renewed agreements between broadcasters and their employees. Ultimately these agreements are subject to resolution under state laws, and media-industry employers could find themselves hit with substantial lawsuits and countersuits for damages for merely including impermissible non-compete clauses in their employment agreements. It is no longer safe to just re-use the old form of employment contract that you have stored in your computer or file cabinet.