

## **New York Enacts “Broadcast Employees Freedom to Work Act”**

**August 15, 2008**

On August 6, New York Governor David A. Paterson signed the “Broadcast Employees Freedom to Work Act,” a new law that prohibits broadcast employers in New York from requiring certain broadcast employees to sign covenants not to compete as a condition of employment. As written, the new law places significant restrictions on the ability of employers in the broadcast community to negotiate post-employment noncompete terms as part of any employment agreement. By its terms, the law takes effect immediately.

The law provides that affected employers

shall not require as a condition of employment, whether in an employment agreement or otherwise, that a broadcast employee or prospective broadcast employee refrain from obtaining employment . . . (a) in any specified geographic area; (b) for a specific period of time; or (c) with any particular employer or in any particular industry.

The law applies only to post-employment noncompete agreements and not to restrictions on competition during the employment relationship.

The law defines a “broadcasting industry employer” to include television, radio, and cable stations or networks, internet, or satellite-based services similar to broadcast stations, or any other entity that provides broadcasting services such as news, weather, traffic, sports, educational, or entertainment reports or programming. Employees of such broadcast industry employers are broadly defined to mean “any on-air employee or off-air employee of a broadcasting industry employer, excluding management employees.” The law does not define who are “management employees” and therefore exempt from the statute. The law also does not indicate whether it applies to independent contractors or to employees of New York broadcast companies who work in other states.

There is also some uncertainty in the definitions of “broadcast industry employer” and “broadcast employee.” While the legislative history suggests that the New York legislature wanted to make sure the public continued to receive news from “trusted sources,” the law is much more expansive than that and, at least by its terms, seems to apply to all employees who do not fit within the undefined “management” exclusion.

The law provides for civil penalties and attorneys’ fees to employees whose rights are violated, without describing how damages are to be calculated. In addition, the statute provides that the protections afforded employees under the law may not be waived and that any agreement intended to waive the

prohibitions of the law shall be “null and void and may not be enforced against the parties in any court or other jurisdiction.”

There is scant legislative history on the new law. What little there is emphasizes the notion that covenants not to compete are restraints on the ability of employees to find work and earn a living. The legislative history further advances the concept that there is limited freedom of contract and no practical negotiations between broadcast employees and their employers with respect to the terms of existing noncompete provisions. The law mirrors similar legislation in Illinois, Massachusetts, Arizona, and Maine.

The new law leaves unanswered many critical questions that New York courts, and employers, will have to consider. First, it is completely unclear how damages are to be calculated. For example, would a broadcast employee who has been required to sign a noncompete agreement, and later refrains from accepting employment on the basis of that noncompete agreement, be entitled to back pay for the term of the noncompete provision? Also, the law and the legislative history are silent as to whether existing contracts can be enforced.

We will continue to keep you apprised of new developments as these and other issues are addressed by the courts of New York. In the meantime, employers should contact their legal counsel about existing agreements as well as contracts in the process of negotiation.

Morgan Lewis has a nationwide team of attorneys who have the skills and background to design noncompete and trade secret programs that protect some of the most valuable assets of any business. These attorneys regularly seek injunctions in state and federal court to prevent disclosure and misuse of trade secrets and other confidential information, and to challenge contractual and fiduciary breaches by departing executives.

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