CHANGING FACES

Who's The Boss?

In A Flood of New Legislation, Who is Running Your Company?

GOETZ FITZPATRICK

NEW YORK | NY

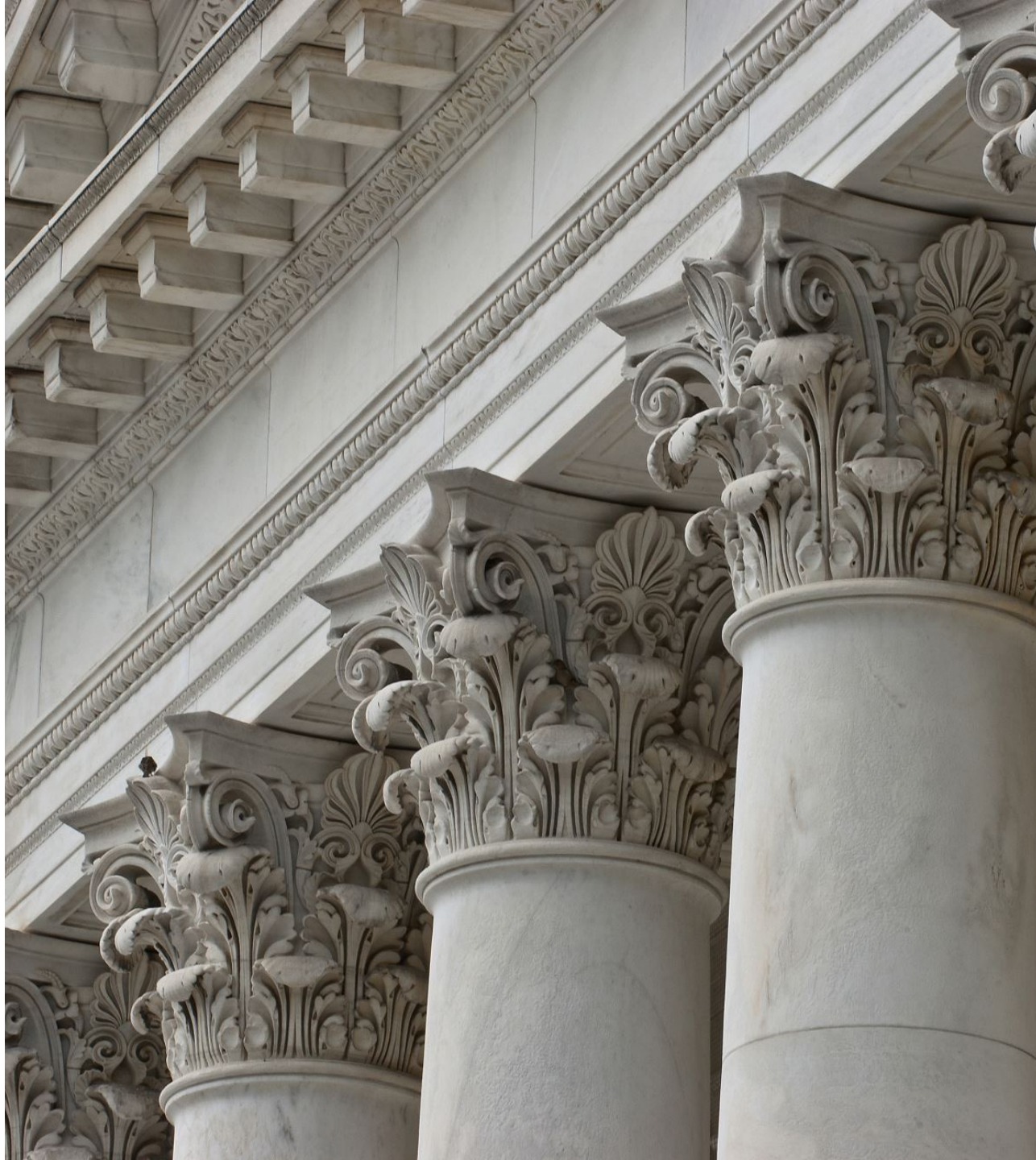
October 28, 2023

Presented to you by:
Howard M. Rubin, Esq.
Goetz Fitzpatrick LLP
1 Penn Plaza, Suite 3100
212.695.7753
hrubin@goetzfitz.com

The Death of Non-Compete Agreements in New York

- In a significant development, the New York State Legislature has taken steps to potentially outlaw non-compete agreements for employees and workers. If the bill is signed into law by Governor Kathy Hochul, it will mark a substantial change for New York employers who have traditionally used non-compete agreements as a means of protecting their business interests.

- This bill, which would be one of the most far-reaching non-compete restrictions in the United States, aligns New York with several other jurisdictions, including California, Minnesota, North Dakota, and Oklahoma, which have already banned such agreements



No Retroactivity

- The bill's language is primarily forward-looking. It aims to prohibit non-compete agreements that are entered into or modified after its effective date, which would take effect 30 days after Governor Hochul's signature.
- This means that any non-compete agreements already in place before this effective date would not be automatically invalidated by the law. In simple terms, agreements in place before the 29th day after the Governor signs it would likely remain enforceable under current law.
- As such, existing non-competes would remain enforceable, but new agreements or modifications would be prohibited.

Unanswered Questions

- The bill primarily focuses on banning new non-compete agreements, it leaves questions regarding existing agreements unanswered.
- The bill's silence on the overall treatment of existing non-compete agreements creates uncertainty. For example, it is unclear whether an existing non-compete provision prior to the bill’s passing would be voided in a situation where an employer and employee modify an employment agreement.
- It is also unclear whether an entire contract containing a non-compete clause would be voided.
- The bill's definition of a "non-compete agreement" encompasses “any agreement, or clause contained in any agreement, between an employer and a covered individual that prohibits or restricts such covered individual from obtaining employment, after the conclusion of employment with the employer included as a party to the agreement.” Covered individuals include employees and independent contractors who are economically dependent on their employer.

Exemptions

- Non-Solicitation Agreements
- In Conjunction with the Sale of a Business
- Agreements Relating to Trade Secrets and Confidential Information

Is It Law Yet?

- The New York State Assembly passed A1278B on June 20, 2023, with the Senate passing its counterpart, Senate Bill 3100A, on June 7, 2023. Governor Hochul’s signature is required to amend New York Labor Law. The bill has not landed yet on Governor Hochul's desk for her signature. After passing the Assembly, it went back to the Senate, likely for some final touches before the Governor's review. As of now, she hasn't received it.

- The 2023 New York legislative session concluded in early June, and the next session won’t start until 2024. Governor Hochul has 30 days to act once she officially receives the bill. If she takes no action within this timeframe, it will be considered a “pocket veto” that prevents the bill from becoming law.

- Even after receiving the bill, the Governor can offer "chapter amendments." This involves an agreement between her, the Assembly, and the Senate to change the bill for the next legislative session. Currently, there’s a belief that she may suggest changes to allow non-compete agreements for high-earning employees.

The Definition of Independent Contractor

- Who counts as an employee versus an independent contractor may be about to change, as a new U.S. Department of Labor (DOL) proposal suggests revamping employee classification. The rule change could have wide-ranging implications for employees, freelancers and employers alike.

Present Checklist

Is the Company in Control or Has the Right to Control What the Worker Does and How the Worker is Doing the Job or Project?

Does the Company Control the Business Aspect of the Worker's Job and Provides Tools and Supplies?

Are There Employee Benefits Such as Pension Plan, Insurance or Vacation Pay?

Proposed Rule Change by the U.S. Department of Labor That Would Affect Employee Classification

- If put into effect in 2023, the new proposal would reclassify workers that are "economically dependent" on a company so they're considered employees instead of contractors, therefore entitling them to more benefits and legal protections.
- Unlike the 2021 IC Rule, this proposed rule considers economic factors that accumulate in an investment of work, which can include scheduling, supervision, price-setting and the ability to work for other employers.
- It also considers whether the work is integral to the employer's business.

Who Is Intended to Benefit?

- Workers in the New Gig Economy
- Independent contractors are paid on an hourly or per-project basis and are not entitled to healthcare benefits, employee retirement benefits or labor protections under laws like the Fair Labor Standards Act (FLSA).
- However, the rise of the gig economy has created a class of worker that effectively works full time for a company but is still considered an independent contractor.
- The proposed rule would change that, availing these workers of benefits and labor protections under federal law.
- Misclassification of independent contractor status robs workers of potential financial benefits and only works in the favor of employers who are hoping to avoid those expenses. When an employer classifies workers as independent contractors, it avoids paying taxes, which includes unemployment insurance taxes. It also prevents workers from filing for workers' compensation if they are injured on the job.

Salary Transparency Movement

- The salary transparency movement is well underway: In 2021, Colorado paved the way for new laws requiring businesses to list salary ranges on job ads, and New York City rolled out its own pay range law in November 2022. A handful of other states and cities say employers must share the salary range for a job during the hiring process.
- In New York state, Gov. Kathy Hochul approved a salary transparency bill in late December that's expected to go into effect in September of 2023. Like the one in New York City, the statewide legislation requires employers with four or more workers to list salary ranges for all advertised jobs and promotions.
- Roughly 1 in 4 workers will soon be covered by a state or local law that requires businesses to be transparent about their pay ranges, according to calculations from analysts at Payscale.

Who Does it Hurt?

- Small businesses could end up feeling the greatest impact.

    1. The inability to protect employee poaching by the curtailing of Non-Compete Agreements.
    2. The restriction of Independent Contractor Agreements will force them to hire more employees and increase their operating costs.
    3. Salary Transparency will result in higher employee salaries and greater movement of employees.

- These law changes may mean small businesses need to reconsider their business model and shift away more jobs from jurisdictions that adapt these legislative changes.