NEW YORK LAW DEVELOPMENTS – A REVIEW OF RECENT LEGAL CHANGES & CHALLENGES IN HOUSING & CONTRACT LAW

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INTRODUCTION

This Article provides a survey of recent changes and proposed changes to New York law. In it, we explore the intricacies of New York law in the context of (1) rent stabilization and (2) non-compete agreements.

We begin with a brief history of rent stabilization in New York City. Then, we analyze the lineage of *Community Housing Improvement Program v. City of New York*, [1] in which plaintiff-landlords lost their challenge in the federal courts of appeal to the New York scheme

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1. Cmty. Hous. Improvement Program v. City of New York, 59 F.4th 540, 544, 557 (2d Cir. 2023).

as an unconstitutional taking without just compensation in violation of the Fifth and Fourteenth Amendments.

Next, we turn to an examination of the proposed statutory changes regarding the use of non-compete agreements in New York, in which we provide a general background on non-compete clauses. Then we analyze the specific 2023 New York proposal, relating to use of non-competes as well as the related national movement surrounding such agreements.

In both sections we conclude with a summary of the potential policy implications on New York law moving forward, what you might expect, and what to watch as further developments occur.

I. RENT STABILIZATION IN NEW YORK

A. History of Rent Stabilization

Rent stabilization in New York City dates back to 1920, when in the shadow of World War I, laws were passed to address severe housing shortages in the city that saw renters organize "rent strikes."[2] Those early laws expired after ten years, and the next wave of rent regulation came from the federal government, partly in response to inflationary pressures brought on by World War II.[3] First, the Emergency Price Control Act (EPCA), signed into law in 1942, froze rents in the city at the 1943 level for several years.[4] In 1947, Congress allowed the EPCA to expire, but replaced it with the Federal Housing and Rent Act of 1947 (FHRA).[5] Notably, the FHRA exempted buildings constructed after February 1, 1947 from its regulations.[6]

Only two years later, Congress passed the 1949 Federal Housing Act, which authorized states to spearhead their own rent control regulation.[7] New York took this opportunity and, in 1950, it created the Temporary State Housing Rent Commission, which had broad regulatory authority, including responsibility for more than two million rental units in New York City.[8] The modern New York City Rent

2. *Id.* at 544.
3. *See id.* at 544–45.
4. *See id.* at 545.
5. *See id.*
6. *See Cmty. Hous. Improvement Program*, 59 F.4th at 545.
7. *See id.*
8. *See id.*

Stabilization Law (RSL) was first enacted in 1969.[9] Its purpose was to ensure affordable housing availability for tenants by preventing excessive rent levels through a number of mechanisms, though its various amendments over the years have provided stronger protections for tenants at times, and for property owners at others.[10] The RSL established the Rent Guidelines Board (RGB) and made the RGB responsible for representing the varying interests of landlords, tenants, and the public at large, and for setting the amounts by which rents were allowed to increase for units under its control.[11]

The RSL was amended in 1971, in the 1980's, in 1993, and most recently in 2019, with the passage of the Housing Stability and Tenant Protection Act of 2019 (HSTPA).[12] Among other things, the HSTPA included a number of changes that were intended to help city tenants: it limited landlords' capacity to charge excess rent attributed to major capital improvements and individual apartment improvements; it repealed vacancy decontrol and high-income decontrol, which in the past had removed units from regulation when the rent or tenant's income reached a specified level; it removed certain vacancy and longevity rent increases, which had allowed landlords to raise rents above the otherwise allowable amounts if a unit became vacant or if a tenant had remained in place for an extended period; and it limited landlords to recovering one rent-stabilized unit per building for personal use upon a showing of necessity, with further limitations on this power in instances where the affected tenant is a senior citizen or disabled.[13]

Under the RSL, as amended by the HSTPA, the RBG is required to consider "relevant data from the current and projected cost of living indices for the affected area" when it determines the maximum allowable rent for units under its purview.[14] This aspect is a central feature of the legal challenges to the HSTPA discussed in Part I(B) below.

A 2023 estimate of the approximately 3,644,000 homes in New York City shows approximately 1,006,000 are rent-stabilized, making up 28% of all housing and 44% of all rental units.[15] As of 2016, of

9. *See id.* at 543, 545.

10. *See id.* at 543–44.

11. *See Cmty. Hous. Improvement Program*, 59 F.4th at 545.

12. *See id.* at 545–46.

13. *See* Housing Stability and Tenant Protection Act, 2019 McKinney's Sess. Laws of N.Y., ch. 36, pts. B, D, I, K.

14. *See id.* at pt. C § 4.

15. See Ilaria Parogni & Mihir Zaveri, *Understanding Rent Regulation in N.Y.C.*, N.Y. TIMES (June 22, 2023), https://www.nytimes.com/article/rent-stabilized-apartments-nyc.html.

New York City's 946,000 rent stabilized apartments, 20% (or 189,000 units) "were occupied by families living below the poverty line," and 64% (over 600,000 units) "were occupied by families who qualify under HUD classifications as low-income, very low-income, or extremely low-income."[16]

B. Recent Legal Challenges

In 2019, two groups of plaintiffs challenged the constitutionality of the HSTPA in federal district courts in New York. Plaintiffs in *Community Housing Improvement Program v. City of New York* were various landlords, joined by the Community Housing Improvement Program and the Rent Stabilization Association (two landlord-advocacy groups).[17] In *74 Pinehurst LLC v. State of New York*, a separate group of landlords brought challenges containing "significantly overlapping claims and issues of law" to those raised in *Community Housing Improvement Program*.[18] Among the two plaintiff groups, claims raised included facial challenges alleging, *inter alia*,[19] that the HSTPA violated the Takings Clause of the United States Constitution as both a physical and regulatory taking, along with as applied claims of certain *74 Pinehurst LLC* plaintiffs.[20] The district court in *Community Housing Improvement Program* granted defendants' motion to dismiss nearly all claims as to all plaintiffs, allowing only the as-applied regulatory takings claims brought by certain of the *74 Pinehurst LLC* plaintiffs to survive.[21] The district court recognized that "Supreme Court and Second Circuit cases foreclose[d] most" of the landlords' challenges.[22] Plaintiffs appealed the dismissal, and the Second Circuit affirmed.[23]

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just

16. *Cmty. Hous. Improvement Program*, 59 F.4th at 546.

17. *See* Cmty. Hous. Improvement Program v. City of New York, 492 F. Supp. 3d 33, 38 (E.D.N.Y. 2020).

18. *Id.* (Though the two cases were not joined, the district court addressed the claims of both plaintiff groups in one opinion due to the broad overlap in the nature of the claims brought).

19. *See id.* (Plaintiffs also mounted an unsuccessful challenge to the constitutionality of the HSTPA as a violation of the Contracts Clause. That claim is not a focus of this article).

20. *See id.*

21. *Id*.

22. *Cmty. Hous. Improvement Program*, 492 F. Supp. 3d at 38.

23. *See* Cmty. Hous. Improvement Program v. City of New York, 59 F.4th 540, 557 (2d Cir. 2023).

compensation."[24] The Takings Clause has been litigated countless times throughout the years, and the U.S. Supreme Court has rejected at least one challenge to rent-control laws under the Takings Clause.[25] A facial challenge to the constitutionality of a statute asserts that the statute is unconstitutional on its face, in any applicable circumstance.[26] To prevail on such a claim, the challenger must "establish that no set of circumstances exists under which the [challenged] Act would be valid," relying on the Supreme Court decision *United States v. Salerno*.[27] Recognizing, as the Second Circuit did, that the bar for succeeding in such a challenge is high, the landlords argued instead that the "no set of circumstances" standard should not apply, and that the court should apply one of two more lenient tests.[28]

First, relying on *City of Los Angeles v. Patel*,[29] the landlords argued that the standard should focus on "the group for whom the law is a restriction, not the group for whom the law is irrelevant," asking that the court only look to the effect of the statue on the persons who it restricts (in this case, the landlords).[30] The Second Circuit rejected this request, holding that *Patel* did not adopt a standard different than that in *Salerno*, but merely clarified the *Salerno* standard, and explained that facial challenges to statutes must establish unconstitutionality in all "applications of the statute in which it actually authorizes or prohibits conduct."[31]

Second, relying on *United States v. Stevens*,[32] the landlords argued that "they need only establish either 'that no set of circumstances exists under which [the statute] would be valid, or that the statute lacks any plainly legitimate sweep.'"[33] The Second Circuit declined this invitation as well, reasoning that the alternative standard suggested by the landlords has been applied in limited circumstances by the U.S. Supreme Court, particularly in the context of the First Amendment, but never beyond that setting.[34] Holding that the stricter *Salerno*

24. U.S. CONST. amend. V.
25. *See* Yee v. City of Escondido, 503 U.S. 519, 539 (1992).
26. *See Cmty. Hous. Improvement Program*, 59 F.4th at 548.
27. *Id*. (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).
28. *See id.* at 548.
29. City of Los Angeles v. Patel, 576 U.S. 409, 418 (2015).
30. *Cmty. Hous. Improvement Program*, 59 F.4th at 548 (quoting *Patel*, 576 U.S. at 418).
31. *Id*. (quoting *Patel*, 576 U.S. at 418 (emphasis omitted)).
32. United States v. Stevens, 559 U.S. 460, 472 (2010).
33. *Cmty. Hous. Improvement Program*, 59 F.4th at 549 (internal quotations omitted).
34. *See id*.

standard applied to the plaintiffs' claims, the Second Circuit found that the restriction of the HSTPA did not meet the high bar, and affirmed the lower court's holding on the facial challenges.[35]

Central to the landlords' regulatory-takings arguments was Justice Scalia's dissent in *Pennell v. City of San Jose*, joined by Justice O'Connor.[36] In *Pennell*, the U.S. Supreme Court upheld a rent control ordinance by the city of San Jose, California.[37] The ordinance in question contained a mechanism for determining the amount by which landlords subject to its provisions could increase rent for their properties that subjected increases of greater than 8% annually to review and determination by a Mediation Gearing Officer who was charged with considering seven statutory factors in reaching a decision of the reasonableness of the increase.[38] While six of the seven factors at play were considered to be objective, one factor—consideration of "the hardship to the tenant"—was subjective.[39] The Court found no constitutional violation, and declined to hold as to whether the existence of the subjective factor rendered the statute unconstitutional because there was no evidence that the factor was actually relied upon to reduce allowed rent levels.[40]

In declining to weigh in on the subjective factor, the Court harkened back to its old "admonition" that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary."[41] Indeed, the Supreme Court has not minced words with respect to facial challenges of statutes, having noted that outside of the First Amendment context, "facial challenges to legislation are generally disfavored."[42]Justices Scalia and O'Connor did not seem compelled by that admonition. They would have held that limiting rent levels based on tenants' ability to pay constitutes an impermissible taking because the government "is not 'regulating' rents in the relevant sense of preventing rents that are excessive;

35. *See id*. at 549–50, 557. The only remaining as-applied challenges on appeal from the district court decision were certain challenges brought by the *74 Pinehurst LLC* plaintiffs and were dealt with in a separate opinion of the Second Circuit. *See* 74 Pinehurst LLC v. New York, 59 F.4th 557, 562 (2d Cir. 2023).

36. Pennell v. City of San Jose, 485 U.S. 1, 15 (1988) (Scalia, J., concurring in part and dissenting in part).

37. *See id*. at 4.

38. *See id*. at 5, 9.

39. *Id*. at 5–6, 10.

40. *See id*. at 9–10.

41. *Pennell*, 485 U.S. at 10 (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 294–95 (1981)).

42. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 223 (1990).

rather, it is using the occasion of rent regulation . . . to establish a welfare program privately funded by those landlords who happen to have 'hardship' tenants."[43]

In the view of Justices Scalia and O'Connor, lawful land-use regulations are permissible in the face of the Takings Clause "because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy."[44] But that relationship was not present in the San Jose ordinance because the hardship that rent obligations have on tenants are "no more caused or exploited by landlords than it is by the grocers who sell needy renters their food, or the department stores that sell them their clothes."[45]

Because the ordinance might require property owners to "bear public burdens [that] . . . should be borne by the public as a whole," the Justices concluded that such a requirement facially violates the Takings Clause.[46] In other words, to the dissenting Justices, the economic plight of the San Jose tenants was a burden that could only lawfully be solved by the public at large (e.g., through raising taxes), and legislation providing a burden only on a sub-set of the public (i.e., landlords) is unconstitutional.

Applied to the HSTPA, plaintiff-landlords liken the requirement that the New York RBG's determination of maximum rents be based in part upon consideration of cost of living indices to the subjective factor that the San Jose Mediation Gearing Officers were charged with considering in *Pennell*.[47] Using Scalia's reasoning, the cost of living indices are a measure of public poverty, and the HSTPA seeks to remedy the harm of poverty by placing a burden on landlords, where the legislative body should instead distribute the burden equally among the broader public.[48] The HSTPA is therefore missing "a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy."[49]

The Second Circuit dispensed of the landlords' *Pennell* argument in a footnote, stating that Scalia's "dissent was just that," and that its

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43. *Pennell*, 485 U.S. at 22 (Scalia, J., concurring in part and dissenting in part).

44. *Id*. at 20.

45. *Id.* at 21.

46. *Id*. at 19 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

47. *Cmty. Hous. Improvement Program v. City of New York*, 59 F.4th 540, 553 n.25 (2d Cir. 2023).

48. *See Pennell*, 485 U.S. at 19 (Scalia, J., concurring in part and dissenting in part).

49. *Id.* at 20.

reasoning is "in tension (if not conflict) with well-established Fifth Amendment doctrine granting government broad power to determine the proper subjects of and purposes for regulatory schemes."[50]

Both sets of plaintiffs filed petitions for certiorari, requesting that the U.S. Supreme Court reverse these decisions.[51] And both petitions were denied.[52]

C. *Implications*

The plaintiffs' request for certiorari in *Cmty. Hous. Improvement Program v. City of New York* was denied without explanation.[53] However, the denial of certiorari to the *74 Pinehurst LLC* plaintiffs was accompanied by a statement from Justice Thomas.[54] Justice Thomas expressed his belief that "[t]he constitutionality of regimes like New York City's is an important and pressing question."[55] However, he identified a problem with the pleadings in *74 Pinehurst LLC* , characterizing them as too general to satisfy the requirements for an as-applied challenge, and too unclear to demonstrate that the statute is facially defective. Still, "in an appropriate future case," Justice Thomas believes that the Court "should grant certiorari to address this important question."[56]

The HSTPA has thus survived the latest legal challenge, and will remain the law of New York City, at least for the time being. But Justice Thomas's statements show that there is an appetite on the Court for a future challenge to be considered, and he has invited future plaintiffs who can address the pleading issues that he identified to bring a new challenge for the Court's consideration.

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50. *Cmty. Hous. Improvement Program*, 59 F.4th at 553 n.25 (quoting Garelick v. Sullivan, 987 F.2d 913, 918 (2d Cir. 1993)).

51. *See* Petition for Writ of Certiorari, Cmty. Hous. Improvement Program v. City of New York, S. Ct. 22-1095 (2023); Petition for Writ of Certiorari, 74 Pinehurst LLC v. New York, S. Ct. 22-1130 (2023).

52. *See* Cmty. Hous. Improvement Program v. City of New York, S. Ct. 22-1095, *cert. denied* (2023), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-1095.html (last visited Mar. 19, 2024); 74 Pinehurst LLC v. New York, S. Ct. 22-1130, *cert.* denied, 2023, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-1130.html (last visited Mar. 19, 2024) (rescheduling distribution multiple times after September 26, 2023).

53. *See Cmty. Hous. Improvement Program*, S. Ct. 22-1095 (2023).

54. *See* Statement by Thomas, J.,74 Pinehurst LLC v. New York, S. Ct. 22-1130 (2023).

55. *Id.* at 1.

56. *Id.* at 2.

The application of existing precedent by the district and circuit courts to the HSTPA may appear at first glance as a rather straightforward and uncontroversial application of law to fact. But the current roster of Justices at the U.S. Supreme Court have not shied as of late from rendering what many believe to be controversial opinions, often times reversing earlier precedent of the Court.[57] If the proper plaintiffs do come along at some future time, then all eyes should be on Scalia's dissent in *Pennell*, and whether five Justices of the present Court will be swayed by its reasoning.

While the lower courts may have faithfully applied existing precedent, it is likely that future landlord-challengers of the HSTPA, emboldened by Justice Thomas's statements, will yet again seek to reverse longstanding precedent, this time under the Takings Clause of the Fifth Amendment. At stake, as the Second Circuit put it, is the government's well-established authority under the Fifth Amendment to determine the proper subjects of and purposes for regulatory schemes. A Supreme Court decision adopting the *Pennell* dissent's reasoning would have immense implications on statutory schemes across the nation.[58]

Further, because the *Pennell* majority relied in part on the principle that "the constitutionality of statues ought not be decided except in an actual factual setting that makes such a decision necessary," a reversal of *Pennell* would serve as another major development in modern Supreme Court doctrine—a doctrine that is not only more willing to reverse precedent, but also allows consideration of significantly more constitutional claims than are currently reviewable.[59]

Dissents, however often they are cited, do not make binding law. That is, until a majority of the Supreme Court decides otherwise. That day may come soon, or it may never come. Until it does, Justice Scalia's *Pennell* dissent will remain just that.

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57. *See, e.g., Stare Indecisis?*, HARV. L. TODAY (Oct. 5, 2022), https://hls.harvard.edu/today/does-overturning-precedent-undermine-the-supreme-courts-legitimacy/ (discussing "the wake of a series of controversial [Supreme Court] rulings overturning longstanding precedents . . . .").

58. *See Rent Control: Policy Issue*, NAT'L APARTMENT ASS'N, https://www.naahq.org/rent-control-policy (last visited Feb. 13, 2024) (providing a breakdown of state and local government rent stabilization laws).

59. *Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294–95 (1981)).

II. LEGISLATION BANNING NON-COMPETE CLAUSES IN NEW YORK STATE

Non-compete provisions have been steadily losing positive perception nationally, and this year both states and the Federal Trade Commission (FTC) are drawing a line in the sand.[60] On January 5, 2023, the FTC proposed to ban non-complete clauses for all workers with no exceptions.[61] The impact of such a rule cannot be understated – these contracts bind tens of millions of Americans in the workforce across a wide range of occupations.[62] The FTC itself estimates that its proposed rule banning such clauses would increase collective earnings by as much as $300 billion per year.[63]

The FTC is not the only entity to propose a ban on non-compete clauses. This year, New York joined the list of states with either proposed or enacted legislation to ban such clauses.[64] This section of this Article: 1) provides a high-level overview of non-compete clauses; 2) describes the federal and state level movement against non-compete clauses; 3) describes New York's recent proposed legislation banning non-compete clauses from 2023; and 4) describes potential impacts of New York's legislation once it is signed into law.

A. General Background on Non-Compete Clauses

A non-compete agreement:

> [P]rohibits an employee from working for a competitor or opening a competing business, typically for a certain period of time after an employee leaves a job. A non-compete may be one section of an employment contract or a standalone contract that an employee signs before or after employment begins.[65]

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60. *See* Sandeep Vaheesan, *The Fight Over Non-Competes is Heating Up. The FTC Must Stand Strong,* TIME (Jan. 23, 2023, 4:47 PM), https://time.com/6249347/fight-over-non-compete-clauses/.

61. *See id.*; *see also* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3516–17 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910) (noting that alternatives to the proposed rule could involve exemptions in uniform application, implying that the proposed rule as it stands applies uniformly to all workers).

62. *See* Vaheesan, *supra* note 60.

63. *See id.; see also* Sandeep Vaheesan, *The Fight Over Non-Competes is Heating Up. The FTC Must Stand Strong,* TIME (Jan. 23, 2023, 4:47 PM), https://time.com/6249347/fight-over-non-compete-clauses/

64. *See* N.Y. Senate Bill No. 3100-A, 246th Sess. (2023) (prohibiting non-compete agreements and certain restrictive covenants).

65. Letita James, N.Y. STATE ATT'Y GEN., *Non-Compete Agreements in New York State Frequently Asked Questions*, (Feb. 2022), https://ag.ny.gov/sites/default/files/non-competes.pdf.

Generally, a non-compete is only enforceable to the extent it is necessary to protect the employer's interests, does not impose any undue hardship on the employee, does not harm the public, and is reasonable in scope.[66] While the law does not require a prospective employee to sign a non-compete, employers themselves can require employees to sign non-competes as a condition of offering the position.[67]

According to a 2019 national survey of private-sector employers, roughly half of the employers responding to the survey required non-competes for some of their employees.[68] Nearly a third required non-compete agreements for all of their employees.[69] In 2023, in its proposed rule banning non-compete agreements, the FTC concluded "one in five American workers—approximately 30 million people—are bound by a non-compete clause."[70] Because these non-compete clauses "prevent workers from leaving jobs and decrease competition for workers, [and] they lower wages for both workers who are subject to them as well as workers who are not," a movement at the state and federal level has gained traction in 2023 to ban such clauses.[71]

B. National Movement Against Non-Compete Clauses

The movement to ban non-compete clauses did not begin in 2023. In March 2019, a public interest and labor coalition, including Open Markets Institute, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), Public Citizen, and the Service Employees International Union (SEIU), petitioned for the FTC to enact a rule banning non-compete agreements.[72] This effort gained traction in July 2021, when President Biden encouraged the FTC to regulate non-compete clauses in an Executive Order.[73]

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66. *See id.*

67. *See id.*

68. *See* Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements: Ubiquitous, Harmful to Wages and to Competition, and Part of a Growing Trend of Employers Requiring Workers to Sign Away Their Rights*, ECON. POL'Y INST. (Dec. 10, 2019), https://www.epi.org/publication/noncompete-agreements/.

69. *See id.*

70. FED. TRADE COMM'N, *Non-Compete Clause Rulemaking,* (Jan. 5, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking.

71. *Id.*

72. *See* OPEN MKTS. INST., *Open Markets, AFL-CIO, SEIU, and Over 60 Signatories Demand the FTC Ban Worker Non-Compete Clauses*, (Mar. 20, 2019), https://www.openmarketsinstitute.org/publications/open-markets-afl-cio-seiu-60-signatories-demand-ftc-ban-worker-non-compete-clauses.

73. *See* Exec. Order No. 14036, 88 Fed. Reg. 36987, 36992 (July 14, 2021).

The FTC issued its proposed rule in January 2023, with the public comment period closing in March.[74] The FTC's proposed rule, which would apply to independent contractors and "anyone who works for an employer, whether paid or unpaid," would make it illegal for employers to "enter into or attempt to enter into a noncompete with a worker; maintain a noncompete with a worker; or represent to a worker, under certain circumstances, that the worker is subject to a noncompete."[75]

Since the close of the comment period, the FTC has not yet issued a final rule. Reports indicate that the Commission is expected to vote on a Rule to ban non-compete clauses in 2024.[76]

The FTC and New York (discussed, *infra*) are not the first government entities to prohibit the use of non-compete agreements. Four states—California, Minnesota, North Dakota, and Oklahoma—have banned non-compete agreements in their entirety.[77] Additionally, Colorado, Illinois, and Maryland have passed more recent legislation limiting non-competes for higher earning employes.[78] New York joined the growing list of states addressing these agreements in 2023, however the Governor vetoed the legislation.

C. New York Proposed Legislation

The New York Attorney General's Office addressed and investigated the misuse of non-compete agreements prior to the legislation passed by the House and Senate in 2023. These investigations focused on misuse of overly broad non-compete agreements, while the 2023 New York legislation addressed those agreements across the board. For example, in prior years, the New York Attorney General reached

74. *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

75. FED. TRADE COMM'N, *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

76. *See* Dan Papscun, *FTC Expected to Vote in 2024 on Rule to Ban Noncompete Clauses*, BL. (May 10, 2023, 4:32 PM), https://news.bloomberglaw.com/antitrust/ftc-expected-to-vote-in-2024-on-rule-to-ban-noncompete-clauses.

77. *See* Leah Shepherd, *States Outlaw Noncompete Agreements*, SOC'Y FOR HUM. RES. MGMT. (July 10, 2023), https://www.shrm.org/topics-tools/employment-law-compliance/states-restrict-ban-noncompetes.

78. *See* Matthew Durham & Briana Al Taqatqa, *Non-Competition Agreements under Scrutiny at State and Federal Level*, DORSEY & WHITNEY (Feb. 2, 2023), https://www.dorsey.com/newsresources/publications/client-alerts/2023/2/noncompetition-agreements-under-scrutiny.

agreements banning certain use of non-competes in the following contexts.

In 2016, Jimmy John's agreed to cease using non-competes for its sandwich makers, where the non-compete "prohibited sandwich makers, for a period of two years after leaving a job with Jimmy John's, from working at any establishment within a two-mile radius of a Jimmy John's location that made more than 10% of its revenue from sandwiches."[79]

In 2016, Law360 agreed to cease using non-competes for editorial employees that prohibited them from working for any media outlet providing legal news for one year after the end of employment.[80]

In 2016, EMSI agreed to cease using non-competes, which "prohibited employees, for nine months after leaving the company, from working for competitors within fifty miles of any location where they worked for EMSI."[81]

In 2018, WeWork agreed to cease using non-competes, which applied broadly to all employees, that "prohibited all employees from working for competitors after leaving the company, regardless of job duties, knowledge of confidential information, or compensation."[82]

In 2023, the New York State Legislature proposed and passed legislation that would have broadly banned non-compete agreements in the state of New York.[83] As of March 2024, this legislation was

79. Press Release, N.Y. STATE ATT'Y GEN., *A.G. Schneiderman Announces Settlement with Jimmy John's to Stop Including Non-Compete Agreements in Hiring Packets*, (June 22, 2016), https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-jimmy-johns-stop-including-non-compete.

80. *See* Press Release, N.Y. STATE ATT'Y GEN., *A.G. Schneiderman Announces Settlement with Major Legal News Website Law360 to Stop Using Non-Compete Agreements for its Reporters*, (June 15, 2016), https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-major-legal-news-website-law360-stop-using.

81. Press Release, N.Y. STATE ATT'Y GEN., *A.G. Schneiderman Agreement Ends Non-Compete Agreements for Employees of National Medical Information Services Company Emsi*, (Aug. 4, 2016), https://ag.ny.gov/press-release/2016/ag-schneiderman-agreement-ends-non-compete-agreements-employees-national-medical.

82. Press Release, N.Y. STATE ATT'Y GEN., *A.G. Underwood Announces Settlement with WeWork to End Use of Overly Broad Non-Competes that Restricted Workers' Ability to Take New Jobs*, (Sept. 18, 2018), https://ag.ny.gov/press-release/2018/ag-underwood-announces-settlement-wework-end-use-overly-broad-non-competes.

83. *See* N.Y. Senate Bill No. 3100-A, 246th Sess. (2023).

vetoed by the Governor and had not made additional progress.[84] In her 2022 State of the State address, Governor Hochul had pledged to outlaw non-compete agreements for workers "earning below the State median wage and to explicitly ban all 'no-poach' agreements under New York State antitrust law."[85] The legislation she vetoed, however, was broader than this pledge.

The proposed legislation was an amendment to the New York State Labor Law and would have added an additional section (new Section 191-d) that would render void "[e]very contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind."[86] This was subject to certain limitations, discussed *infra.*

The proposed legislation defined a "non-compete agreement" to mean broadly "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."[87]

This prohibition applied to "covered individual[s]", which is defined as any

> person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that they are, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person.[88]

The prohibition of this defined "non-compete agreement" to these "covered individual[s]" would prohibit most prospective containing non-competition provisions between employers, employees, and independent contractors.[89]

The legislation did include narrow exceptions, like agreements with a prospective or current covered individual establishing a fixed term of service (e.g., employment agreements setting forth a term of service and/or duration);[90] agreements prohibiting the disclosure of

84. *See* Marysoon Khan, *New York governor vetoes bill that would ban non-compete agreements,* AP (Dec. 23. 2023), https://apnews.com/article/noncompete-agreement-bill-veto-new-york-61e53ad13f41f1da574740438ee34e63.

85. *Id.*

86. N.Y. Senate Bill No. 3100-A, 246th Sess. § 1 (2023).

87. *Id.*

88. *Id.*

89. *Id.*

90. *See id.*

trade secrets, or confidential and proprietary client information;[91] and agreements prohibiting the solicitation of clients of the employer that the covered individual learned about during their employment.[92]

These exceptions were conditioned on the relevant agreements "not otherwise restrict[ing] competition in violation of this section."[93] The bill also would have conferred a private right of action for covered individuals against any employer or business alleged to have violated its provisions, and provides the reviewing court with discretion to void non-compete agreements and to award lost compensation, as well as other damages, reasonable attorney's fees, and costs.[94] In addition, the legislation specifically provided that courts "*shall* award liquidated damages to every covered individual affected under this section, in addition to any other remedies permitted by this section."[95] Liquidated damages were to be calculated as an amount not more than $10,000.[96] Somewhat notably, the FTC's proposed rule does not confer a private right of action.[97]

A covered individual could sue within two years of the latest of the following: (i) when the prohibited non-compete agreement was signed; (ii) when the covered individual learns of the prohibited non-compete agreement; (iii) when the employment or contractual relationship is terminated; or (iv) when the employer takes any step to enforce the non-compete agreement.[98]

The legislation was not retroactive.[99] Instead it included language applying the provisions only prospectively, as it "shall be applicable to contracts entered into or modified on or after" thirty days after it is signed by the Governor into law.[100] Exiting agreements, therefore, would remain legal unless they were modified after the legislation was signed.

The proposed legislation's impact on current agreements had the potential for debate: "[e]very contract by which anyone is restrained

91. *See* N.Y. Senate Bill No. 3100-A, 246th Sess. § 1 (2023).
92. *See id.*
93. *Id.*
94. *See id.*
95. *Id.* (emphasis added).
96. *See* N.Y. Senate Bill No. 3100-A, 246th Sess. § 1 (2023).
97. *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3538 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt 910) (noting there is no private right of action).
98. *See* N.Y. Senate Bill No. 3100-A, 246th Sess. § 1 (2023).
99. *See id.* § 3.
100. *Id.*

from engaging in a lawful profession, trade, or business of any kind is to that extent void."[101] This, taken in tandem with the language above, purportedly would have left current agreements unaffected. The New York State Assembly also, however, issued a Memorandum in Support of Legislation.[102] This Memorandum clearly stated current agreements would be invalid: "The bill would void current non-compete agreements and prohibit employers from seeking such agreements . . . ."[103]

The New York State Senate's "Introducers Memorandum in Support of S3100-A," however, did not include any reference to voiding current non-compete agreements.[104] Instead, it stated: "Subsection 3: Voids non-compete agreements entered into after the effective date and prohibits employers from seeking such agreement."[105]

Therefore, existing common law standards, mentioned *supra*, could have continued to apply to non-disclosure provisions and may limit the scope of non-solicitation provisions. This ban on non-compete provisions would have likely faced legal challenges.

This legislation that was proposed in the state of New York differed from the FTC proposed rule in a few respects. As mentioned *supra*, the FTC proposed rulemaking does not confer a private right of action.[106] The FTC proposed rule provides an exception for certain non-competes in some sale of business agreements to "protect the value of a business acquired by a buyer."[107] Additionally, New York's proposed legislation was prospective, and applied only to non-compete clauses and contracts entered into or modified after the legislation's effective date.[108] The FTC proposed rule, in contrast, would require employers to rescind existing contracts that contain a non-compete clause or agreement.[109]

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101. *Id.* at § 1.

102. *See* N.Y. Senate Bill No. 3100-A, 246th Sess., Legislative Memorandum of Assemb. Joyner (2023).

103. *Id.*

104. *See* N.Y. Senate Bill No. 3100-A, 246th Sess., Legislative Memorandum of Sen. Ryan (2023).

105. *Id.*

106. *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3538 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910) (noting there is no private right of action).

107. *Id.* at 3509.

108. *See* N.Y. Senate Bill No. 3100-A, 246th Sess. § 1 (2023).

109. *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3483 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

D. Impacts

In its January 2023 proposed rule, the FTC describes in detail the overall negative effects of non-compete clauses in the labor market. Non-compete clauses discourage and depress mobility in the labor market and reduce wages for employees both with and without non-compete clauses. These clauses also contribute to general and racial wage gaps. These negative impacts extend even to CEOs. Further, non-compete clauses hinder innovation, which harms consumers and creates higher prices.

The New York legislation, since vetoed, will currently have no impact on the labor market. The Governor vetoed the bill against the urging of the FTC, which noted that allowing such agreements to continue would harm innovation and prevent new business from forming in New York.[110] The Governor did state that she would reconsider legislation with the "right balance": "I continue to recognize the urgent need to restrict non-compete agreements for middle-class and low-wage workers, and am open to future legislation."[111]

CONCLUSION

This overview of recent changes and proposed changes to New York Law discussed the intricacies of New York law in the context of rent stabilization and non-compete agreements. *Community Housing Improvement Program v. City of New York* may lead to implications in the context of rent stabilization, as the plaintiff-landlords appeal their challenge to the New York scheme as an unconstitutional taking without just compensation in violation of the Fifth and Fourteenth Amendments.

The previously proposed statutory changes regarding the use of non-compete agreements in New York mirrored a growing movement across states and at the federal level to prevent the use of such clauses

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110. Sean M. Ryan, *FTC Letter to Governor Hochul Outlines Several Reasons for Governor to Sign Noncompete Ban into Law*, N.Y. SENATE (Nov. 29, 2023), https://www.nysenate.gov/newsroom/press-releases/2023/sean-m-ryan/federal-trade-commission-highlights-positive-impact#:~:text=Governor%20Hochul%20must%20sign%20or,wage%20levels%20across%20the%20nation.

111. *See* Marysoon Khan, *New York Governor Vetoes Bill That Would Ban Noncompete Agreements,* AP (Dec. 23. 2023, 4:58 PM), https://apnews.com/article/noncompete-agreement-bill-veto-new-york-61e53ad13f41f1da574740438ee34e63.

in employment contracts. This change at the New York and the federal level would lead to implications that could dramatically affect the marketplace in the state and should continue to be monitored throughout 2024.