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Answers to Key Questions About Washington, D.C.'s New Legislation Limiting Non-Compete Agreements

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Washington, D.C. recently enacted sweeping new legislation, the Ban on Non-Compete Agreements Amendment Act of 2020, barring most non-compete agreements between employers and employees in the District of Columbia. This advisory addresses key questions about the new legislation.

Is the new legislation effective yet? No, but it likely will be effective soon. Although the District of Columbia city council passed the legislation unanimously and the mayor signed it on January 11, 2021, legislation in the District of Columbia is subject to Congressional review before it becomes effective. The legislation was transmitted to Congress on February 1, 2021, commencing the review process. Absent Congressional intervention, the Act is projected to become law on March 19, 2021. [UPDATE: After publication of this advisory, the effective date of the statute initially was delayed to April 1, 2022 and then was delayed again to October 1, 2022.]

What does the new legislation do? The legislation bars employers from entering into agreements, or having policies, that prohibit an employee from being "employed by another person, performing work or providing services for pay for another person, or operating the employee's own business." This is broad legislation that will ban virtually all non-compete provisions. The legislation, however, permits non-compete agreements entered into between the seller and purchaser of a business.

Who is covered by the new legislation? The legislation is broad. It bans the use of a non-compete provision between an employer "operating in the District" and an employee "who performs work in the District on behalf of an employer" or a prospective employee who an employer "reasonably anticipates will perform work on behalf of the employer in the District." While the legislation applies to an employee who "performs work in the District", that key phrase is not defined, and the proposed legislation does not specify whether a physical presence in the District is required. The legislation also does not specify whether there is a minimum threshold for when someone "performs work" in the District. It seems clear that employees who are based in Washington, D.C. are covered by the legislation. There is no guidance yet, however, on whether the legislation applies to employees based outside of the District who do occasional work in the District or who service a small number of clients in the District. Similarly, with many employees working remotely during the COVID-19 pandemic, the legislation does not explicitly address whether it applies to employees who normally work outside of the District but are currently working from home inside the District, or to employees who normally work in the District but are currently working from home outside the District.

Are there exceptions for some types of employers or employees? There are a handful of very narrow exceptions, including exceptions for casual babysitters, volunteers, and physicians who have completed a medical residency and make at least $250,000 per year. The definition of "employer" does not include the District of Columbia or United States governments. Unlike recent non-compete legislation enacted by some other states that covered only lower-wage employees, the D.C. legislation applies regardless of the compensation earned by the employee.

Does the legislation really prohibit employers from restricting an employee's activities while the employee is actively employed by the employer? Yes. The prohibition in the legislation specifically bars agreements and policies that prohibit an employee from "being simultaneously

or subsequently" employed by another employer, performing work for another person, or operating his or her own business. If enforced as written, this would prevent employers from requiring that employees devote their full time and attention to employment and could allow employees to simultaneously work for two competing companies. There are, however, fiduciary and confidentiality obligations that will still limit an employee's ability to work for more than one employer at a time, especially if the two employers are competitors.

Does the new legislation apply to existing contracts or policies? No and yes. The legislation does not apply to contracts that are executed prior to the effective date of the legislation, but it does apply to pre-existing policies. After the effective date, the legislation will apply to any type of contract that contains a non-compete provision.

What about confidentiality provisions? Confidentiality provisions are still permissible. The legislation specifically provides that its definition of a non-compete provision does not include agreements that restrict an employee from disclosing the employer's confidential, proprietary, or sensitive information, client list, customer list or trade secrets.

Does the legislation bar non-solicits? The legislation does not specifically address the propriety of provisions that prevent an employee from soliciting certain clients or employees. Since there is no mention of non-solicits, it is reasonable to conclude that the legislation does not bar non-solicits. The definition of a banned non-compete provision, however, is broad and there is no explicit carve out for non-solicits like there is for confidentiality provisions, so employers will need to see if courts apply the definition of non-compete provisions expansively to try to include non-solicits.

What about garden leave or notice periods? Again, the legislation does not specifically bar notice or garden leave provisions, so it is reasonable to expect that employers will continue to try to use tailored notice or garden leave provisions that do not trigger the new statute. The question of whether the definition of a prohibited non-compete provision is broad enough to encompass notice or garden leave provisions is an open one that may depend on the specific language of the provision at issue.

Do employers need to give employees notice of this new legislation? Yes. Employers must give written notice to all covered employees within 90 days after the legislation becomes effective. Employers also must give written notice to new employees within seven days of beginning their employment and to any covered employee who requests a copy of the notice in writing. The statute provides the specific language that must be used in the notice.

What are the consequences for violating the statute? An employee may file an administrative complaint with the Mayor's office or a civil complaint in a court of competent jurisdiction. The legislation provides for administrative fines of between $350 and $1,000 per violation, statutory liability for violations (with penalties of at least $500 for attempting to have a covered employee sign a banned non-compete provision, and at least $1,500 for attempting to enforce a banned non-compete provision), and "such legal and equitable relief as may be appropriate", including reasonable attorneys' fees, back wages, three-times the amount of unpaid wages, and reinstatement of employment. Employees may bring claims in class or collective actions.

Will we get more guidance? The legislation instructs the Mayor's office to issue rules to implement the legislation, so it is possible that those regulations will include additional guidance on many of the open issues. Otherwise, the courts will need to address these issues as litigations arising out of the new legislation are filed.

What should employers with employees in Washington, D.C. do next? Employers should prepare for the legislation to go into force. This should include:

- reviewing and, where necessary, revising existing policies and standardized agreements impacting employees in the District to ensure that they do not run afoul of the new legislation;

- preparing to give the required written notice to all covered employees upon the legislation becoming effective and putting procedures in place to give notice to all new covered employees within seven days of employment;
- identifying contracts that automatically renew upon expiration and considering whether those contracts will be impacted if they renew after the effective date of the new legislation;
- increasing reliance on confidentiality agreements and fiduciary obligations to protect sensitive information and business;
- consulting with counsel about the potential use of notice provisions, garden leave, or non-solicits with employees who perform work in the District; and
- considering the feasibility of moving employees with whom non-compete agreements are critical out of Washington, D.C.

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