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Washington, D.C. Revises New Non-Compete Statute to Avoid Total Ban

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In a welcome move for employers, Washington, D.C. has significantly scaled back its anticipated ban on non-competes with employees. In late 2020, the D.C. City Council passed the Ban on Non-Compete Agreements Amendment Act (the "Ban Act") which would have imposed a near-total ban on non-competes for employees who work in the District. (Here is our summary of the Ban Act). This caused serious concerns for many employers, especially in the post-pandemic world where the ability to work remotely made it harder to control where some employees worked. However, the Ban Act never took effect as the D.C. City Council continued to delay its implementation while considering potential amendments. The City Council recently passed the Non-Compete Clarification Amendment Act of 2022 (the "Amended Act") significantly curtailing the reach of the original Ban Act. The Amended Act takes a more moderated approach to non-competes while still imposing meaningful limitations on employers' use of non-competes with employees who work primarily in the District.

Unlike the Ban Act, the Amended Act does not bar all non-competes with employees in D.C. Instead, the Amended Act follows a recent trend in state non-compete statutes and prohibits non-competes with employees whose total compensation is under a set threshold while permitting non-competes with employees whose compensation exceeds that threshold. D.C. set its threshold at total annual compensation of more than $150,000 per year. Compensation includes not only hourly wages and base salary, but also bonuses, commissions, vested stock (including restricted stock units), and other payments in cash or cash equivalents. Beginning in 2024, the compensation threshold will increase each year based on the average annual increase, if any, in the Consumer Price Index for consumers in the Washington, D.C. metropolitan area.

The Amended Act defines a non-compete as a provision in a contract or policy that "prohibits an employee from performing work for another for pay or from operating the employee's own business." The Amended Act, like the Ban Act, specifically allows employers to utilize confidentiality agreements and does not apply to non-competes that are entered into as part of a sale of a business. The Amended Act also provides that long-term incentives such as equity compensation, stock options, or restricted stock units that are typically earned over more than one year are not, in and of themselves, non-compete provisions. The Amended Act does not specifically refer to non-solicitation provisions that prevent an employee from soliciting certain clients or employees.

The Amended Act imposes a number of notice requirements that employers must follow if they utilize non-compete provisions with employees who exceed the compensation threshold:

- The employer must provide a non-compete agreement to the employee in writing at least 14 days before (a) commencement of employment for new employees or (b) the date the employee must execute the agreement for existing employees.
- Employers with policies that contain non-compete provisions must provide written copies of those policies (a) to new employees within 30 days of acceptance of employment, and (b) to existing employees within 30 days of October 1, 2022 and any time the policies change.
- An employer proposing a non-compete provision to an employee also must provide the employee with a specific written notice using language set out in the Amended Act.

The Amended Act also imposes new limitations on the terms of non-compete provisions:

- A non-compete provision must provide specific information about the "functional scope" of the restriction, including identifying the services, roles, industry, or competing entities to which the restriction applies.
- A non-compete provision must specify the geographical limitations of the restriction.
- A non-compete provision must not exceed 365 days from the last date of employment.

The Ban Act would have applied to all employees who perform any amount of work in the District. This would have cast a very wide net that swept up anyone who did even a small amount of work in Washington, D.C. The Amended Act narrows this significantly. It covers only employees who (1) spend (or are reasonably anticipated to spend) 50% or more of their work time for the employer working in the District, or (2) are based in the District, regularly spend (or are reasonably anticipated to regularly spend) a "substantial amount" of time in the District, and will not spend more than 50% of their work time for the employer in another jurisdiction.

One of the more surprising provisions of the Ban Act barred virtually all anti-moonlighting provisions that prohibited an employee from being "simultaneously" employed by another company (even a competitor) during the employee's employment. The Amended Act gives employers some additional leeway. It allows employers to enforce anti-moonlighting provisions if the employer reasonably believes that the outside employment will (1) result in the employee's disclosure or use of confidential information, (2) conflict with established rules of the employer, the industry or the profession regarding conflicts of interest, (3) be a conflict of commitment for employees employed by a higher education institution, or (4) harm the employer's ability to comply with applicable laws or regulations.

The Amended Act, like the original Ban Act, also includes anti-retaliation provisions. Employers may not retaliate or threaten to retaliate against employees for (1) refusing to sign a non-compete provision that is barred by the Amended Act, (2) failing to comply with a non-compete provision that is barred by the Amended Act, or (3) asking or complaining to the employer, a coworker, a lawyer or a government agency about the "existence, applicability or validity" of a provision that the employee reasonably believes is prohibited under—or does not comply with the requirements of—the Amended Act. Employers also may not retaliate or threaten to retaliate against employees for asking for a copy of a proposed or executed non-compete, or for asking the employer to provide the disclosure information required by the Amended Act.

Employees may file administrative complaints with the District of Columbia or commence a civil action for violations of the Amended Act in any court of competent jurisdiction. In addition, the D.C. Mayor and Attorney General may enforce the Amended Act and impose penalties on employers of between $350 and $1,000 for each violation of the Amended Act.

Absent unanticipated opposition in Congress, the Amended Act will become effective October 1, 2022. The Amended Act will then apply to contracts signed on or after October 1, 2022 and to policies that are in effect on or after October 1, 2022. While employers in D.C. will be relieved that the Ban Act has been superseded by the Amended Act, employers should still take steps now to prepare for the changes that the Amended Act will bring to the use of non-compete provisions in Washington, D.C.

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