D.C.'s Amended Non-Compete Statute Bans (Most) Non-Competes in the District

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In December 2020, Washington, D.C. enacted one of the country?s most sweeping non-compete bans to date. The original Ban on Non-Compete Agreements Amendment Act of 2020, which was signed into law by D.C. Mayor Muriel Bowser on January 11, 2021, purported to prohibit all non-compete restrictions for D.C. employees, and even went so far as to prohibit personnel policies against outside work during employment, discussed **here**. Backlash from employers was significant, and the effective date of the statute was repeatedly delayed while the District considered how to address these concerns. In response, the D.C. City Council passed the D.C. Non-Compete Clarification Amendment Act of 2022 (the ?Act?). This scaled-back statute, which took effect October 1, 2022, still prohibits most non-compete restrictions and anti-moonlighting policies but carves out key exceptions for highly compensated employees and certain types of outside employment.

Under the Act, employers are prohibited from entering into a non-compete agreement with a covered employee on or after October 1, 2022. ?Non-compete agreement? is defined very broadly and includes any contractual provision or policy that prohibits an employee from ?performing work for another for pay or from operating the employee?s own business.? This language therefore encompasses both contractual non-compete restrictions, as well as so-called ?moonlighting? policies that prohibit current employees from engaging in outside employment, with certain exceptions described below. The Act applies to any employee who spends more than 50% of their work time within the District, as well as prospective employees whom the employer ?reasonably expects? will spend more than 50% of their work time in the District.

The amended Act does allow employers to include non-compete restrictions in employee long-term incentive plans (though there is some ambiguity in the Act), and also allows for non-compete agreements tied to the sale of a business. The Act also expressly allows employers to implement employee confidentiality agreements that protect against use or disclosure of proprietary information.

Notably, and unlike its prior iteration, the Act does not apply to ?highly compensated employees.? This is defined by the Act to mean any employee who currently earns at least $150,000 a year in

compensation, or $250,000 a year for medical specialists, which includes commissions and bonuses but not fringe benefits. This wage threshold will be adjusted every January starting in 2024. While employers are allowed to impose non-compete restrictions on these highly compensated employees, such restrictions:

- must be reasonably limited in scope of activities to those performed for the employer,
- must be limited to working for a competitive entity,
- must be narrow and reasonable in geographic scope, and
- cannot extend longer than 365 days post-termination, or 730 days for medical specialists.

Highly compensated employees must be presented with any such agreements, as well as a required notice of their rights under D.C. law, at least 14 days before they start employment or before they are asked to sign such an agreement, whichever occurs later.

Another clarification in the amended statute is that it now expressly allows for certain anti-moonlighting policies. Specifically, the Act excludes from the definition of ?non-compete provision? any otherwise lawful policy or provision that prohibits outside employment, if such activities would (in relevant part) either result in the employee?s disclosure or use of the employer?s confidential or proprietary information, or if it would conflict with established rules of the employer?s industry or profession regarding conflicts of interest. If an employer chooses to implement such an anti-moonlighting policy, it must provide covered employees with a notice of their rights under the Act within 30 days after accepting employment, or within 30 days after October 1, 2022, and within 30 days of any changes to such policy.

In addition to the above requirements, the D.C. statute prohibits employers from retaliating against an employee who refuses to sign or comply with a provision that violates the statute or who raises concerns about suspected violations of the statute. The Act also imposes certain recordkeeping requirements on employers. Aggrieved employees may file an administrative complaint or file a private action in court. Employers found to have violated the Act are subject to statutory penalties, which vary based on the provision violated.

Though the amended statute is narrower than its predecessor, it is not without its own ambiguities. For example, the statute is silent as to whether employers may have customer or employee non-solicitation agreements with D.C. employees (though the definition of ?non-compete agreement? could arguably be interpreted to include agreements not to perform work for an employer?s customers). This omission is likely to be tested in court in the future.

In light of the new non-compete statute, as well as lingering uncertainties about the scope of some of its restrictions, employers should be mindful of ensuring that any restrictive covenant agreement or policy applicable to D.C. employees is lawful and enforceable moving forward. Employers are encouraged to consult with labor and employment attorneys to comply with the Act as well as other state and local non-compete laws.

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