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DC Council Passes One of the Broadest Bans on Non-Competes in the Country

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Quick Hit: On December 17, 2020, the Council of the District of Columbia passed the Ban on Non-Compete Agreements Amendment Act of 2020 (the "Act"), which, subject to certain very narrow exceptions, will "make void and unenforceable non-compete[s]" entered into after the effective date of the law. The Act also prohibits employers from maintaining workplace policies that prevent employees from working for other employers and retaliating against employees for exercising their rights under the Act.

Key Takeaways: If the Act is permitted to go into effect, DC will have one of the, if not ***the*** broadest bans on non-competition agreements in the nation. It will impose a near total ban on non-compete agreements in DC, prohibiting employers from barring any employee (except for babysitters and certain medical professionals) from working for competitors not only after their employment ends, but also apparently ***during*** their employment. The Act will only apply to non-competes entered into after its effective date and expressly does not apply to confidentiality agreements.

The Act, unless vetoed, will impact all employers with employees who work in DC – not just those who utilize non-compete agreements. The apparent bar on prohibiting simultaneous employment with competitors (or any other employer), will render illegal anti-moonlighting and other policies and contractual provisions widely viewed as reasonable and non-controversial. Moreover, its broad enforcement mechanisms and statutory penalties may lead to significant litigation for violations of the Act's requirements, and even its notice obligations.

More Detail:

If the Act becomes law, DC will join the growing number of jurisdictions (such as Illinois, Maryland, Massachusetts, Virginia, and Washington) that have restricted employers' use of non-competition agreements in recent years. However, the Act goes farther in that it is not limited to a certain subset of employees such as low-wage workers. It applies to all employees who "perform[] work in the District" and prospective employees employers "reasonably anticipate[] may perform work" in the District, except for babysitters and certain medical professionals. Indeed, it appears that the Act may be among one of the most restrictive in the country, not only because it virtually bars the use of non-compete restrictions for employees post-employment, but because it appears to also prohibit the use of non-competition agreements to prevent an employee "from being ***simultaneously***" employed by any other employer.

The Act, however, is still subject to the Mayor's veto (in which case the Council will have the opportunity to override the veto – which it appears to have the votes to do). Additionally, even if it receives Mayoral approval, it will be subject to a 30-day period of congressional review pursuant to the Home Rule Act prior to becoming effective.

What The Act Prohibits

The Act provides that employers operating in the District may not "require or request that an employee sign an agreement that includes a non-compete provision" and that "[a] non-compete provision contained in an agreement that was entered into on or after the applicability date of [the Act] between an employee and an employer shall be void as a matter of law and unenforceable."

The Act further bars employers from having workplace policies "that prohibit[] an employee from: (1) [b]eing employed by another person; (2) [p]erforming work or providing services for pay for another person; or (3) [o]perating the employee's own business."

The Scope Of The Prohibitions

Agreements Covered: The Act broadly defines a "non-compete provision" as an agreement that prohibits working for another employer after ***or during*** the employee's employment. Specifically, the Act provides that a "'[n]on-competition provision' means a provision of a written agreement between an employer and an employee that prohibits the employee from being ***simultaneously or subsequently*** employed by another person, performing work or providing services for pay for another person, or operating the employee's own business." This broad definition may have implications for standard employment agreements, which often require such employees to agree to devote their full time and efforts to their work for a single employer.

The Act does, however, explicitly carve out certain provisions as being permissible, including:

- "An otherwise lawful provision that restricts the employee from disclosing the employer's confidential, proprietary, or sensitive information, client list, customer list, or a trade secret"; and
- "An otherwise lawful provision contained within or executed contemporaneously with an agreement between the seller of a business and one or more buyers of that business wherein the seller agrees not to compete with the buyer's business."

The Act is silent as to non-solicitation provisions, so it appears they are not covered by the Act's prohibitions.

Employees Covered: Unlike non-compete laws recently passed in other jurisdictions, the Act's prohibitions apply broadly to almost all employees "who perform[] work in the District" or who an employer "reasonably anticipates will perform" such work. It is unclear whether there is a threshold for the amount of work required in the District before the law applies. The Act also expressly exempts certain workers from coverage, specifically: volunteers, "lay member[s] elected or appointed to office within the discipline of any religious organization and engaged in religious functions," "casual babysitter[s]," and "medical specialists." It is unclear why the Council identified volunteers and religious lay leaders as workers for whom non-compete agreements are acceptable.

Even the medical specialist exception is narrow. The Act defines a "medical specialist" as "an individual who performs work in the District of Columbia on behalf of an employer engaged primarily in the delivery of medical services and who: (A) [h]olds a license to practice medicine; (B) [i]s a physician; (C) [h]as completed a medical residency; and (D) [h]as total compensation of at least $250,000 per year." Although these doctors are excluded from the protections of the Act, the Act prescribes procedures for "[a]n employer that seeks to have a medical specialist execute a non-compete provision as a condition of employment." Specifically, the Act requires that an employer provide "[t]he proposed non-compete provision directly to the medical specialist at least 14 days before execution of the agreement containing the provision;" and provide the following written notice at the same time it provides the proposed non-compete provision:

The Ban on Non-Compete Agreements Amendment Act of 2020 allows employers operating in the District of Columbia to request non-compete terms or agreements (also known as "covenants not to compete") from medical specialists they plan to employ. The prospective employer must provide the proposed non-compete provision directly to the medical specialist at least 14 days before execution of the agreement containing the provision. Medical specialists are individuals who: (1) perform work on behalf of an employer engaged primarily in the delivery of medical services; (2) hold a license to practice medicine; (3) have completed a medical residency; and (4) have total compensation of at least $250,000 per year.

Anti-Retaliation Provisions

The Act also prohibits an employer from "retaliat[ing] or threaten[ing] to retaliate against an employee for:"

- "The employee's refusal to agree to a non-compete provision;"
- "The employee's alleged failure to comply with a non-compete provision or workplace policy made unlawful by [the Act];"
- "Asking, informing, or complaining about the existence, applicability, or validity of a non-compete provision or a workplace policy that the employee reasonably believes is prohibited under [the Act] to any of the following:

  (A) An employer, including the employee's employer;

  (B) A coworker;

(C) The employee's lawyer or agent; or

(D) A governmental entity; or"

- "Requesting from the employer the information required to be provided to the employee."

Notice Requirement

The Act requires all employers to provide notice of the Act to their employees. Specifically, employers must provide to employees in writing, the following language from the Act: "No employer operating in the District of Columbia may request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement, in accordance with the Ban on Non-Compete Agreements Amendment Act of 2020."

This notice must be provided at the following three times:

1. "Ninety calendar days after the applicability date of this title;"
2. "Seven calendar days after the individual becomes an employee of the employer; and"
3. "Fourteen calendar days after the employer receives a written request for such statement from the employee."

Given that the Act has only prospective effect, one can imagine the provision of such notice to all employees within 90 days of the Act's effective date will cause significant confusion about the viability of pre-existing non-competes.

Enforcement and Penalties

The Act provides a civil right of action as well as an administrative complaint procedure for bringing claims for violations of the Act. For civil actions, employees will apparently be entitled to the typical remedies provided for in employment-related actions, including attorneys' fees and costs if they prevail. In addition, the Act appears to provide a host of statutory remedies for violations of the Act, ranging from $500 to $3,000 per violation, including its prohibition against non-compete provisions and workplace policies prohibiting work for other employers, notice requirements, and procedures for entering into non-compete provisions with medical specialists. Further, violations may be imposed for an employer attempting to enforce a non-compete provision that is unenforceable or void, or for acts of retaliation prohibited by the Act.

The Act will be administered and enforced by the Mayor and Attorney General. The Act instructs the Mayor to "issue rules to implement the provisions of [the Act], including rules requiring employers to keep, preserve, and retain records related to compliance with [the Act]." Employers will be required to make records "open and . . . available for inspection or transcription" by the Mayor or Attorney General.

The Act also provides that the Mayor may assess an administrative penalty of "no less than $350 and no more than $1,000 for each violation of [the Act]; except that each violation of [the Act's anti-retaliation provisions] assessed against an employer shall be for not less than $1,000." Before collecting an administrative penalty, the Mayor must provide "the employer alleged to have violated [the Act] notification of the violation, notification of the amount of the administrative penalty to be imposed, and an opportunity to request a formal hearing held pursuant to the Administrative Procedure Act."

We will continue to follow developments regarding the Act and report on them here.

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