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Amendments to D.C.'s New Law Banning Non-Competes Proposed

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Quick Hit. On May 21, 2021, Councilmember Elissa Silverman proposed the Non-Compete Conflict of Interest Clarification Amendment Act of 2021 (the "Bill"), which would amend D.C.'s Ban on Non-Compete Agreements Amendment Act of 2020 ("Act") which bans (with limited exceptions) all agreements and policies that restrict simultaneous and post-employment activities. Unfortunately, the Bill does not seek to change the near-complete ban on post-employment non-competes. It does, however, attempt to provide some relief as to the law's bar on simultaneous employment restrictions by permitting "bona fide conflict of interest" policies. If it ultimately becomes law, this change could be helpful for employers seeking to maintain legitimate conflict of interest policies that appeared to be barred by the Act's broad prohibitions.

Key Takeaways. Employers hoping the D.C. Government would scale back the Act in significant ways will be disappointed by the limited scope of the proposed amendments. Even so, the Bill's attempt to permit "bona fide conflict of interest" policies is a welcome development, even if its precise contours are not absolutely clear. If passed in its current form, the Bill would allow employers to restrict employees from engaging in activities for which they receive "money or a thing of value" that would cause the employer to "[c]onduct its business in an unethical manner."

It is unclear when or if the Bill will pass and whether and how it will be amended prior to passage. What is clear is employers need to continue to prepare for the Act to go into full effect, and cannot count on major changes being made to the law.

More Detail. As we previously reported, in December 2020 the D.C. Council passed the Ban on Non-Compete Agreements Amendment Act of 2020 ("Act"), which not only bans all post-employment non-compete agreements for D.C. employees (with certain narrow exceptions), but also bars any policy or agreement that prohibits D.C. employees from simultaneously working for other employers.

While the law only goes into full effect after "the date of inclusion of its fiscal effect in an approved budget and financial plan" – expected to occur sometime this summer – employers have been scrambling to determine how to adapt to the law and its wide-ranging ramifications. This is particularly true for the bar on restricting simultaneous employment, which has no precedent and may implicate numerous common policies and codes – such as conflict of interest policies, codes of ethics, and anti-moonlighting policies – that have historically been viewed as non-controversial and necessary to avoid real and perceived conflicts of interest.

Since the Act's passage, employers have been hoping the D.C. Government would amend the law or otherwise provide helpful guidance with respect to such policies and codes and otherwise limit the Act's reach and scope. On May 21, 2021, Councilmember Elissa Silverman proposed the Non-Compete Conflict of Interest Clarification Amendment Act of 2021 (the "Bill"), which would amend the Act in a number of ways. The key proposed amendments are detailed below.

First, and most significantly, the Bill seeks to clarify that the ban on workplace policies prohibiting employees from "[b]eing employed by another person," "[p]erforming work or providing services for pay for another person," and "[o]perating the employee's own business," does *not* extend to "bona fide conflict of interest" policies or provisions.

The Bill defines "bona fide conflict of interest provision" as one that "bars an employee from accepting money or a thing of value from a person during the employee's employment with the employer because the employer reasonably believes the employee's acceptance of money or a thing of value from the person will cause the employer to: (A) Conduct its business in an unethical manner; or (B) Violate applicable local, state or federal laws or rules."

Second, the Act helpfully makes clear confidentiality agreements are not banned by its prohibitions, but the Act defined such agreements as those prohibiting "the employee from disclosing the employer's confidential, proprietary or sensitive information, client list, customer list, or a trade secret." The Bill would amend this definition to not only permit confidentiality agreements that restrict disclosure of protected information, but also the *use* of such information.

Third, the Act requires employers to provide employees with notice of the Act. The Bill would incorporate the Act's notice language into D.C.'s existing Notice of Hire Form, which employers are required to give to employees upon hire to memorialize the compensation terms of their employment.

As noted above, we do not know when or if the Bill will pass and what changes, if any, will be made prior to passage. As such, employers need to prepare for the Act as it currently exists, which includes reviewing any restrictive covenant agreements, as well as any confidentiality, conflict of interest, ethics, and anti-moonlighting agreements, codes, and policies that apply to D.C. employees to ensure they do not violate the Act.

We will continue to monitor and report on significant developments regarding the Act.

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