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[Podcast]: Ban on Non-Compete Agreements Amendments Act of 2020

Law and the Workplace Blog on **October 20, 2021**

In this episode of The Proskauer Brief we are joined by partner Guy Brenner, who heads up Proskauer's D.C. Employment Law practice and co-chairs our Non-Compete and Trade Secrets Practice group and Daryl Leon, an associate in Proskauer's New York office and senior member of the Firm's Non-Compete and Trade Secrets Practice Group. Tune in as we discuss "The Ban on Non-Compete Agreements Amendment Act of 2020," a law that is set to take effect in our nation's capital in 2022. The law essentially bans all employers from entering into any agreements that bar their employees who work in D.C. from working for other employers or operating their own businesses.

Daryl Leon: Hello and welcome to The Proskauer Brief: Hot Topics in Labor and Employment Law. I'm Daryl Leon, an associate in Proskauer's New York office and a senior member of the Firm's Non-Compete and Trade Secrets Practice Group. With me today is Proskauer partner, Guy Brenner, who heads up or D.C. Employment Law practice and co-chairs our Non-Compete and Trade Secrets Practice group. For today's episode, I've asked Guy to join us to discuss a law that is set to take effect in 2022, in our nation's capital, "The Ban on Non-Compete Agreements Amendment Act of 2020." Guy, welcome.

Guy Brenner: Daryl, it's always good to be with you.

Daryl Leon: Guy, thank you for joining us. I know you've been fielding a lot of questions about this new law. What does it do?

Guy Brenner: Well, Daryl. Once the law goes into effect, D.C. will have the most restrictive law regarding non-competes in the country. The law essentially bans all employers from entering into any agreements that bar their employees who work in D.C. from working for other employers or operating their own businesses. And this is where D.C. goes beyond any other jurisdiction. That restriction exists either after their time with the employer ends or simultaneously during their employment. There are currently only very limited exceptions that apply to doctors making $250,000 or more a year, quote-unquote causal babysitters, volunteers in certain labor, religious leaders. But essentially, when the law goes into effect, employers will be barred from restricting their employees from competing or working in any capacity, either after their time with the employer ends or simultaneously during employment.

Daryl Leon: So, Guy, that's a profound difference from what we see in a number of states across the county. It's not common, but certainly not unheard of, for a state to ban post-employment non-competes. Still, it sounds like what we have here is that employers are prohibited from restricting employees to work for a competitor while they are currently employed?

Guy Brenner: That's exactly right, Daryl, and that's what makes this law so broad and so different from what we've seen before. And the thing to bear in mind is that the law doesn't just bar formal, contractual agreements, where you typically see non-competes. Still, it also bars employers from having policies that prohibit simultaneous or post-employment work.

Daryl Leon: Guy, doesn't that raise a whole host of issues regarding conflict of interest policies and anti-moonlighting policies?

Guy Brenner: Daryl, you hit the nail on the head. You know, and there are a lot of companies that don't use non-compete agreements. So they may have looked at this law and said, you know, I don't have to worry about it because I don't have my employees sign on to non-compete agreements. But even those companies now need to worry about this law because if they have a conflict of interest policy of any kind that prohibits simultaneous work, this law impacts them.

Daryl Leon: What about confidentiality agreements and non-solicitation restrictions? What does the new law say about those?

Guy Brenner: The law expressly permits confidentiality agreements. It's silent on non-solicitation restrictions, so I believe the prevailing view is that both are permitted so long as they don't prohibit employees from working for others.

Daryl Leon: Got it. What are some of the other aspects of the law that employers should be aware of?

Guy Brenner: Well, the law has a notice provision. It has a specific language that needs to be provided to employees within 90 days of the law becoming effective. Whenever a new employee is hired or if an employee, for some reason it decides to ask for the notice. It also prohibits employers from retaliating or threatening to do so in response to an employee refusing to agree to a prohibited non-compete or failing to comply with an unlawful non-compete agreement or policy. In addition, the law creates a cause of action where an employee can bring a claim for violations of the law which provides for remedies, including attorney's fees and costs.

Daryl Leon: So I guess the big question here is when does this law go into effect?

Guy Brenner: Well, you know the law was passed at the very end of 2020, and for a long time, we didn't really know precisely when the law was going into effect. Recently the D.C. council though put an end to that uncertainty and has set an effective date for April 1, 2022.

Daryl Leon: Alright, it sounds like employers do have a little bit of time. What should they be doing to prepare for the new law going into effect?

Guy Brenner: Well, there are a few things that employers can be doing now. First, the law does not have a retroactive effect, so employers can continue to enter into non-competes until April 1st. D.C. employers may want to consider whether to expand the circle of employees subject to such agreements or examine whether to implement non-compete agreements when they haven't done so in the past. They really have a limited window in which to do so. Second, D.C. employers may want to examine their confidentiality and non-solicitation agreements to see if they can or should be strengthened in anticipation of the world where their employees will be free to work for others while also working for them. Third, employers should look at their policies and assess whether any prohibit simultaneous employment and, if so, plan to amend them by April 1, 2022. In addition to you know anti-moonlighting policies, codes of conduct and ethical codes, conflict of interest policies, those types of policies typically will have restrictions on simultaneous employment, and they're ones that employers in D.C. should be looking at. And finally, employers may want to explore other arrangements that discourage competition while not prohibiting it. So the law actually uses the word "prohibit" when it talks about the restriction that employers are barred from imposing on their employees. We've been developing some creative options for employers, and employers you know should consider whether there are other ways to comply with the law but still protect their legitimate interests.

Daryl Leon: Great, I think that's really helpful and definitely something that employers should be paying attention to in considering over the coming months. Anything else, Guy, that our listeners should know about the law?

Guy Brenner: Well, you know, any employer that is operating in D.C. or that you know has employees that work in D.C. need to be watching this space closely. There are rumblings that this law may be amended in the next few months to add some additional carve-outs for certain industries or types of employers or for certain types of policies. So D.C. employers should keep an eye out for those developments, and we will be monitoring them and reporting on any developments on our Law and the Workplace blog.

Daryl Leon: Guy, that just about wraps our time up for today. Thank you so much for this informative and eye-opening discussion about the D.C. ban on Non-Compete Agreements Amendment Act of 2020, and thank you for joining me today on The Proskauer Brief. To our listeners, stay tuned for more insights on the latest hot topics in labor and employment law, and be sure to follow us on Apple Podcasts, Google Podcasts, and Spotify.

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