Labor & Employment Alert

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Washington, D.C.'s New Non-Compete Law Is Now in Effect

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Key Points:

- Originally poised to be one of the broadest non-compete bans in the country, Washington, D.C.'s scaled-back non-compete law became enforceable on October 1, 2022.
- The new law prohibits non-competition provisions for covered employees but allows non-competes with highly compensated employees that meet certain drafting and procedural requirements.
- The new law does not prohibit non-competition provisions with the seller of a business, otherwise lawful confidentiality provisions or certain anti-moonlighting provisions.
- All D.C. employers with permissible workplace policies restricting employees' use or disclosure of confidential information or outside employment activities must provide copies of the policies to affected D.C. employees by October 31, 2022 and comply with additional notice requirements.
- D.C. employers who violate the law will be subject to penalties.

After two years of delays and amendments, Washington, D.C.'s new non-compete law finally became legally effective on October 1, 2022. As summarized in our prior alert, Washington D.C.'s original Ban on Non-Compete Agreements Amendment Act of 2020 (the "2020 Legislation") would have banned non-competition agreements and anti-moonlighting policies for virtually all D.C. employees. Backlash from the D.C. business community led the D.C. Council to delay implementation of the 2020 Legislation and pass a scaled-back version in the form of the Non-Compete Clarification Amendment Act of 2022 ("Amended Act").

Although non-competition provisions entered into with "covered employees" on or after October 1, 2022 are void and unenforceable, the Amended Act permits non-competition agreements with highly compensated employees and allows employers to utilize confidentiality agreements and anti-moonlighting policies in certain circumstances. The Amended Act also includes employer notice requirements and imposes penalties for violations.

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Non-competition agreements entered into before October 1, 2022 are not affected by the Amended Act; however, the new law applies to preexisting workplace policies and practices.

Covered Employers

The Amended Act broadly applies to all "employers," defined as any individual, partnership, general contractor, subcontractor, association, corporation or business trust operating in D.C., or any person or group of persons acting directly or indirectly in the interest of an employer operating in D.C. in relation to an employee. The definition includes prospective employers but excludes the D.C. and United States governments.

Scope of Employees Subject to Non-Compete Ban

Under the Amended Act, non-competition provisions are banned for any "**covered employee**," which is defined as an employee who is not a "highly compensated employee" and: (1) spends more than 50 percent of his or her work time for the employer working in D.C.; or (2) whose employment for the employer is based in D.C. and the employee regularly spends a substantial amount of his or her work time for the employer in D.C. and not more than 50 percent of his or her work time for that employer in another jurisdiction. The term "covered employee" also includes new hires who have not yet started work if the employer reasonably anticipates that they will fall into one of the two foregoing groups.

Employers navigating remote work arrangements and return-to-office requirements should keep this definition in mind. For example, assuming equal workdays, the Amended Act would apply to a non-highly compensated employee who regularly works from the employer's office in Virginia two days a week but works remotely from his or her home in D.C. three days a week.

The following categories of people are excluded from the non-compete ban, and therefore can still be bound by non-competition provisions: (1) highly compensated employees; (2) casual babysitters in or about the residence of the employer; (3) partners in a partnership; and (4) D.C. and federal government employees.

The term "**highly compensated employee**" means an employee, other than a broadcast employee,[1] who is reasonably expected to earn in a consecutive 12-month period, or who has earned in the preceding 12-month period, compensation greater than or equal to the "**minimum qualifying annual compensation**," which is currently $150,000 or, if the employee is a medical specialist, $250,000. Beginning January 1, 2024, these thresholds will increase each year based on increases in the Department of Labor's Consumer Price Index for All Urban Consumers in the Washington Metropolitan Statistical Area.

For purposes of determining whether an employee meets these thresholds, "**compensation**" is broadly defined as all monetary remuneration the employer may pay or promise the employee, including hourly wages, salary, bonuses or cash incentives, commissions, overtime premiums, vested stock (including restricted stock units) and other payments provided on a regular or irregular basis. The definition of compensation, however, does not include fringe benefits other than those paid to the employee in cash or cash equivalents.

Prohibited Agreements and Policies

Under the Amended Act, "[b]eginning October 1, 2022, no employer may require or request that a covered employee sign an agreement or comply with a workplace policy that includes a non-compete provision." The term "**non-compete provision**" is defined as "a provision in a written agreement or a workplace policy that prohibits an employee from performing work for another for pay or from operating the employee's own business." Of note, the term "workplace policy" includes both written and unwritten rules and practices.

The Amended Act sets forth four categories of provisions that are *excluded* from the definition of "non-compete provision" (and therefore not affected by the new law) provided that they are otherwise lawful:

1. Non-competition provisions in the sale of business context.
2. Non-disclosure or confidentiality provisions that prohibit or restrict an employee from disclosing, using, selling or accessing the employer's confidential or proprietary employer information.
3. Anti-moonlighting provisions that prohibit or restrict an employee from "[a]ccepting money or a thing of value for performing work for a person other than the employer, during the employee's employment with the employer, because the employer reasonably believes the employee's acceptance of money or a thing of value under such circumstances will": (a) "[r]esult in the employee's disclosure or use of confidential employer information or proprietary employer information"; (b) "[c]onflict with the employer's, industry's, or profession's established rules regarding conflicts of interest"; (c) "[c]onstitute a conflict of commitment if the employee is employed by a higher education institution"; or (d) "[i]mpair the employer's ability to comply with District or federal laws or regulations; a contract; or a grant agreement."
4. A provision that provides a "**long-term incentive**," which is defined as "bonuses, equity compensation, stock options, restricted and unrestricted stock shares or units, performance stock shares or units, phantom stock shares, stock appreciation rights, and other performance driven incentives for individual or corporate achievements typically earned over more than one year."

Although the Amended Act clarifies some issues that arose under the 2020 Legislation related to the scope of the ban, a couple issues remain outstanding and will be subject to further legislation or judicial interpretation. First, the fourth exception related to long-term incentives is unclear, as the Amended Act does not specify whether the exception applies to *any* non-competition covenants in a long-term incentive agreement or whether it is limited to forfeiture-for-competition provisions or similar provisions under which the penalty imposed on the employee for competing against the employer is limited to forfeiture of the long-term incentive (as opposed to any ban or limitation on future employment). The written testimony received by the D.C. Council in July 2021 advocated for an exception under which the non-compete ban would not apply to long-term incentive awards that are forfeited if an employee joins a competitor, suggesting that the exception may not have been intended to apply to all non-competition covenants in a long-term incentive agreement.[2]

Second, the Amended Act is silent about whether other restrictive covenants in the employment setting are permissible for covered employees, such as prohibitions on

the solicitation of customers or employees. Although it remains to be seen how courts interpret the Amended Act, prior reports by the D.C. Council's Committee on Labor and Workforce Development suggested that non-solicitation provisions are not intended to be covered by the non-compete ban.[3] While the lack of any express mention of such provisions in the Amended Act suggests that they are not covered by the legislation, employers can hedge against the possibility of courts applying the statute to non-solicitation provisions by treating them in the same fashion under the Amended Act as express non-competition clauses until there is definitive authority to the contrary.

Requirements for Non-Competition Agreements with Highly Compensated Employees

For non-competition agreements with highly compensated employees, the Amended Act requires that such agreements include three things: (1) "[t]he functional scope of the competitive restriction, including what services, roles, industry, or competing entities the employee is restricted from performing work in or on behalf of"; (2) the geographic scope of the restriction; and (3) the term of the restriction, which cannot exceed 365 days from the date of the employee's separation from employment (or 730 days if the employee is a medical specialist). These statutory requirements are in addition to the usual contractual requirements necessary for an enforceable agreement, such as a valid offer, acceptance and consideration to support the undertakings.

Employers must provide highly compensated employees with a written copy of the non-competition provision at least 14 days before the individual commences employment or, if the individual is already employed, at least 14 days before the individual must execute the agreement. Additionally, whenever the non-competition provision is proposed to a highly compensated employee, the employer must provide the employee with a statutory notice that states the following:

The District's Ban on Non-Compete Agreements Amendment Act of 2020 limits the use of non-compete agreements. It allows employers to request non-compete agreements from highly compensated employees, as that term is defined in the Ban on Non-Compete Agreements Amendment Act of 2020, under certain conditions. [Name of employer] has determined that you are a highly compensated employee. For more information about the Ban on Non-Compete Agreements Amendment Act of 2020, contact the District of Columbia Department of Employment Services (DOES).

Required Disclosures of Workplace Policies

In addition to providing the above notice to highly compensated employees, an employer "with a workplace policy that includes one or more of the exceptions to the definition of non-compete provision [namely, non-disclosure/confidentiality provisions; anti-moonlighting and conflicts of interest rules; or non-competition provisions in the context of long-term incentive programs]. . . shall provide a written copy of the provisions to an employee": (1) within 30 days after the employee's *acceptance* of employment; (2) within 30 days after October 1, 2022 (i.e., by October 31, 2022); and (3) any time such policy changes. This disclosure requirement applies to all affected D.C. employees, not only highly compensated employees.

Although it appears that this disclosure requirement primarily was intended to require employers to disclose conflicts of interest restrictions, the requirement can be read to apply more broadly to any workplace policy that is permitted under the Amended Act based on its exclusion from the definition of "non-compete provision."[4] Therefore, employers should plan to provide affected employees with copies of any confidentiality or non-disclosure policies, anti-moonlighting policies, conflicts of interest policies, or other policies that fit under the exception.

Prohibited Retaliation

The Amended Act prohibits employers from retaliating against or threatening to retaliate against covered employees (i.e., employees who cannot be subject to non-competition provisions) for: (1) refusing to agree to a non-competition provision; (2) the covered employee's alleged failure to comply with a non-competition provision that is prohibited under the Amended Act; (3) asking, informing or complaining to an employer, coworker, lawyer, agent or governmental entity about the existence, applicability or validity of a non-competition provision that the employee reasonably believes is prohibited under the Amended Act; (4) requesting a copy of the non-competition provision; or (5) asking the employer to provide the information required under the Amended Act's disclosure requirements. The Amended Act also includes similar anti-retaliation protections for highly compensated employees.

Recordkeeping Requirements

The Amended Act instructs the Mayor to issue rules to implement its provisions, including "[r]ules requiring the preservation and retention of workplace policies, non-compete provisions, non-compete agreements, the written disclosures required by [the Amended Act], and other records related to demonstrating compliance." The Amended Act authorizes the Mayor and the D.C. Attorney General to inspect such records upon demand at any reasonable time.

Collective Bargaining Agreements

The Amended Act does not supersede the terms of a valid collective bargaining agreement.

Consequences of Violations

Any non-competition agreement entered into on or after October 1, 2022 that violates the Amended Act is void and unenforceable. The Amended Act also subjects employers to administrative and civil penalties for violations. The Mayor may assess administrative penalties between $350 and $1,000 for each violation, except that the penalty for each retaliatory act will be at least $1,000. Additionally, each aggrieved employee may pursue relief by filing an administrative complaint with the Mayor or by filing a civil action in court to recover between $250 and $2,500 for each violation, depending on the violation, or at least $3,000 for certain subsequent violations.

Recommended Steps for Employers

Employers should consider the following steps to ensure compliance with the new law:

- Evaluate the company's employee population, including remote workers, to identify all covered employees and all employees who meet the criteria for highly compensated employees.
- Review and update form offer letters, non-competition agreements, and other agreements that will be provided to covered employees to remove any non-competition provisions. (Employers also should be sure to evaluate whether there is sufficient consideration to support such updated agreements for incumbent employees.)
- Ensure that any new non-competition agreements entered into with highly compensated employees comply with the Amended Act's drafting requirements and are supported by consideration. (Agreements entered into before October 1, 2022 do not need to be altered.)
- Prepare procedure to comply with the 14-day advance notice and the written statutory notice requirements for highly compensated employees.
- Review and update written policies, such as employee handbooks and codes of conduct, and unwritten practices to ensure that they do not violate the Amended Act.
- Prepare plan to provide copies of any confidentiality or non-disclosure policies, anti-moonlighting policies, conflicts of interest policies or other applicable policies to all affected D.C. employees by October 31, 2022 and any time these policies are changed, and to new hires within 30 days after their acceptance of employment.
- Provide training to managers and HR personnel about the Amended Act's prohibitions and requirements.
- Keep an eye out for the rules to be issued by the Mayor and comply with any recordkeeping requirements.
- Set a reminder to check for the new compensation threshold for highly compensated employees that will apply as of January 1, 2024.

[1] "Broadcast employees" (as defined in the Amended Act) cannot be bound by non-competition provisions, even if they earn $150,000 or more.

[2] *See Report on B24-256, the "Non-Compete Clarification Amendment Act of 2022"*, Committee on Labor and Workforce Development, Council of the District of Columbia, at 27 (June 16, 2022), https://lims.dccouncil.gov/downloads/LIMS/47234/Committee_Report/B24-0256-Committee_Report1.pdf.

[3] *See, e.g., id.* at 7 ("This committee has pointed out that non-solicitation and non-disclosure agreements are better suited and narrowly tailored to protecting trade secrets and other confidential information than non-compete agreements.").

[4] *See id.* at 5-6 ("In most of the cases detailed by the businesses, amendments allowing conflict of interest restrictions on employees would simply maintain the status quo that existed in those workplaces. However, with the complexity of these additional exceptions, it could become difficult for an employee to understand whether their employer had such a policy. Therefore, the Committee print now requires employers who rely on any of these exceptions to provide it in writing to the employee.").

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