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D.C. Council Passes Law Significantly Scaling Back Non-Compete Ban

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On July 12, 2022, the District of Columbia Council voted to modify key aspects of the Ban on Non-Compete Agreements Amendment Act ("the Act"), passing the Non-Compete Clarification Amendment Act of 2022 ("the Amendment"). As we previously reported, the Act, which was enacted in January 2021 but has yet to take effect, sought to impose the broadest non-compete prohibition in the country, barring, with narrow exceptions, all simultaneous and post-termination employment restrictions for employees in D.C. Since its inception, the Act has been subject to criticism which has led to numerous extensions of its applicability date.

Now, in response to those criticisms, the D.C. Council has taken action. The Amendment, if signed into law as expected (and not blocked by Congress), contains a number of significant "clarifications" to the Act and gives employers with D.C. employees options for utilizing non-competition agreements and other policies – such as conflict of interest policies – that were to be banned by the Act. As discussed in detail below, the Amendment, among other things, narrows the coverage of its non-competition restrictions, permits the entry into non-competes with "highly compensated individuals" (subject to certain requirements), permits the inclusion of non-competition provisions in long term incentive agreements, and contains numerous carve outs permitting certain common employer limitations on simultaneous employment (such as conflict of interest policies). As a general matter, the Amendment is a welcome development for employers with employees in D.C.

Employers with D.C. employees should become familiar with the new law in advance of its October 1, 2022 effective date to ensure they understand what will be permitted after the effective date, comply with its technical requirements, and do not engage in prohibited acts. Even employers that do not utilize non-competition agreements need to be aware of the law, as it impacts policies typically not thought to be regulated by non-competition laws.

“Covered Employees” Definition Narrowed

The Amendment redefines which employees are subject to the Act’s non-compete ban. The Act broadly covered any “individual who performs work in the District on behalf of an employer and any prospective employee who an employer reasonably anticipates will perform work on behalf of the employer in the District,” excluding only certain unpaid volunteers, lay members “elected or appointed to office within the discipline of any religious organization and engaged in religious functions”, an individual employed as a casual babysitter, in or about the residence of the employer, and certain medical specialists.

The Amendment revamps this definition, helpfully limiting employees covered by the Act in significant ways. As discussed below, the Amendment excludes “highly compensated employees” from the non-compete ban (subject to specific conditions). In addition, it adds helpful detail regarding which non-highly compensated employees are covered. For example, only employees who (i) spend more than 50% of their time working in D.C., or (ii) if they spend “a substantial amount of” their “work time for the employer” in D.C. and do not spend more than 50% of their work time in another jurisdiction, as well as new hires expected to meet either of these requirements, are covered. Covered employees also include “broadcast employee[s]” regardless of whether they are “highly compensated employees.” Broadcast employees are defined as “on- or off-air creator[s] (such as an anchor, disc jockey, editor, producer, program host, reporter, or writer) of a legal entity that owns or operates” a television, radio, or cable station or network, a satellite-based service similar to a broadcast station or network, or any other entity that provides broadcasting services such as news, weather, traffic, sports, or entertainment programming.

The Amendment continues to exclude casual babysitters employed “in or about the residence of the employer” from coverage, but has dropped the unpaid volunteer and lay religious leader exclusions. Further, the Amendment adds a new exclusion from coverage for “partner[s] in a partnership.”

The Scope Of Prohibited Non-Competes Significantly Narrowed

The Amendment narrows the scope of what constitutes a prohibited “non-compete provision” by both modifying the term’s definition and by expressly excluding certain categories of restrictions from that definition.

The Amendment redefines the term “non-compete provision” 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.” Notably, this definition still covers employer policies (both written and those implemented “as a matter of practice”), not just agreements with employees. The “non-compete provision” definition also covers restrictions during the employee’s employment with the employer and not just post-employment restrictions.

Beginning October 1, 2022, employers will be barred from requiring or requesting covered employees enter into agreements or comply with workplace policies that include a non-compete provision. Non-compete provisions that violate the law are deemed void as a matter of law and unenforceable. However, the definition of “non-compete provision” expressly excludes a number of categories of restrictions (provided they are “otherwise lawful”), meaning all employees may be subject to the following:

- Provisions restricting employees from “[d]isclosing, using, selling, or accessing the employer’s confidential employer information or proprietary employer information.” Although a similar carve out was included in the Act, the Amendment’s version is more detailed. Notably, “confidential employer information” is defined as “information owned or possessed by the employer which is not available to the general public and which the employer has taken reasonable steps to ensure is protected from improper disclosure,” and “proprietary employer information” is defined as “information unique to an employer that is compiled, created, or solicited by the employer, including customer lists, client lists, and trade secrets as that term is defined in section 2(4) of the Uniform Trade Secrets Act of 153 1988, effective March 16, 1989 (D.C. Law 7-216; D.C. Official Code § 36-401(4)).”
- Provisions restricting employees 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”:
    - “[r]esult in the employee’s disclosure or use of confidential employer information or proprietary employer information”;
    - “[c]onflict with the employer’s, industry’s, or profession’s established rules regarding conflicts of interest”;
    - “[c]onstitute a conflict of commitment if the employee is employed by a higher education institution,” with “conflict of commitment” defined as

"conduct that would compromise the ability of an employee of a higher education institution to perform employment duties for the institution because the activities risk interfering with the employee's primary duties for the institution"; or

- "[i]mpair the employer's ability to comply with District or federal laws or regulations; a contract; or a grant agreement."

- Provisions "[t]hat provide[] 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."

The definition of "non-compete provision" also excludes provisions "[c]ontained 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."

Employers Are Permitted to Enter Into Non-Competes with "Highly-Compensated Employees" (Under Certain Conditions)

The Amendment would permit non-compete provisions for "highly compensated employees." "Highly compensated employees" are defined as those who are "reasonably expected to earn from the employer, in a consecutive 12-month period, compensation greater than or equal to the minimum qualifying annual compensation," or "[w]hose compensation earned from the employer in the consecutive 12-month period preceding the date on which the proposed term of non-competition is to begin is greater than or equal to the minimum qualifying annual compensation."

"Minimum qualifying annual compensation" for "highly compensated employees" is defined as $150,000 except for "medical specialists" (essentially licensed physicians who are primarily engaged in the delivery of medical services and who have completed their medical residency) in which case the compensation minimum is $250,000. These amounts are subject to annual adjustments to reflect increases in the consumer price index.

Notably, “compensation” is broadly defined to include “all monetary remuneration an employer may pay or promise an employee.” The Amendment specifies that “compensation” includes: 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. However, “compensation” does not include “fringe benefits other than those paid to the employee in cash or cash equivalents.”

The Amendment also imposes certain requirements for a highly compensated employee’s non-compete to be enforceable. Specifically, the agreement must:

- Be in writing and provided to the employee “[a]t least 14 days before the individual commences employment for the employer” or, “[i]f the employer already employs the highly compensated employee, at least 14 days before the employee must execute the agreement”; and
- Specify:
  - “The 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;”
  - “The geographical limitations of the work restriction;” and
  - “If the employee is not a medical specialist, a term of non-competition that does not exceed 365 calendar days from the date the employee separates from employment with the employer” or “[i]f the employee is a medical specialist, a term of non-competition that does not exceed 730 calendar days from the date the employee separates from employment with the employer.”

When an employer proposes to have a highly compensated individual enter into a non-competition agreement, the Amendment requires the employee be provided the following notice:

“The District of Columbia 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” 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).”

Anti-Retaliation Provisions

The Amendment prohibits employers from retaliating or threatening to retaliate against a covered employee for:

(1) The covered employee's refusal to agree to a non-compete provision or non-compete agreement that is prohibited by the Amendment;

(2) The covered employee's alleged failure to comply with a non-compete provision or non-compete agreement that is prohibited by the Amendment;

(3) Asking, informing, or complaining about the existence, applicability, or validity of a provision in a workplace policy or employment agreement that the employee reasonably believes is prohibited by the Amendment, or making a request for a copy of such a provision, to any of the following:

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

(B) A coworker;

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

(D) A governmental entity; or

(4) Asking the employer for the information required to be provided to the employee pursuant to the Amendment's disclosure requirements (discussed below).

The Amendment further prohibits retaliating or threatening to retaliate against highly compensated employees for

- - asking for a copy of a proposed non-compete provision or non-compete agreement, or for a copy of a non-compete provision or non-compete agreement that the employee executed;
  - asking the employer for the information required to be provided to the employee pursuant to the disclosure provisions of the Amendment (discussed below); or
  - asking about or objecting to a proposed non-compete provision or agreement because the employee reasonably believes that the provision or agreement does not conform to the Amendment's non-compete enforceability requirements, where such inquiry or objection is made to
    - an employer, including the highly compensated employee's employer;

- a coworker;
- the highly compensated employee's lawyer or agent; or
- a governmental entity.

Required Disclosures

In addition to the disclosure discussed above for highly compensated employees, the Amendment requires employers to make disclosures to employees when they have "a workplace policy that includes one or more of the exceptions to the definition of 'non-compete provision.'" In such circumstances, the employer "shall provide a written copy of such provisions to" affected employees:

(1) Within 30 days after the employee's acceptance of employment with the employer;

(2) Within 30 days after October 1, 2022; and

(3) Any time such policy changes.

Enforcement Provisions

The Mayor and D.C. Attorney General are empowered to administer and enforce the law. The Mayor may assess administrative penalties between $350 and $1,000 for each violation of the law; though penalties for violating the retaliation provisions must be no less than $1,000.

The law also provides a private cause of action, providing aggrieved persons the ability to file an administrative complaint with the Mayor or a civil action.

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The Amendment will be sent to the Mayor, who is expected to sign it into law. Assuming it becomes law, it will become effective on October 1, 2022. We will continue to provide updates regarding this significant development for employers in D.C.

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