Employment & Labor Law Alert
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District of Columbia Bans Employer Non-Compete Provisions

The District of Columbia has joined a handful of states with laws severely limiting the use of non-compete provisions. D.C. Mayor Muriel Bowser signed into law the "Ban on Non-Compete Agreements Amendment Act of 2020" on Jan 11. The effective date of the Act remains up in the air, however, because it is subject to both congressional review and the District's budgetary appropriations process.

The Act bans in large part the use of non-compete provisions in employment contracts, as well as in workplace policies, whether written in a manual or enforced by the employer as a matter of practice. Provisions in agreements entered into after the effective date of the Act are void and unenforceable. Not only are employers prohibited from restricting employees from joining a competitor after termination, they also can't prohibit employees from "moonlighting" by working for someone else or for their own business, even those that might compete with the employer. In addition, while the language of the Act broadly bars employment policies that prohibit employees from working for themselves or another employer, it does not specifically address conflict of interest, non-solicitation, non-interference and other similar provisions that many employers have in their contracts, policies and codes of conduct.

The non-compete ban will give employees a private right of action, prohibit employers from retaliating or threatening to retaliate against an employee for refusing to agree to a non-compete provision, and assess penalties for violations.

States that have enacted similar bans on non-compete agreements include Illinois, Maryland, Massachusetts, New Hampshire, Oregon, Rhode Island, Virginia and Washington.

'Non-Compete' Definition

The Act defines a "non-compete provision" as 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.

The definition specifically excludes "[a]n 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, as that term is defined in section 2(4) of the Uniform Trade Secrets Act of 1988[.]"

The Act also does not specifically address non-solicitation or non-interference provisions and policies, which typically prohibit soliciting or accepting business from a specific group of customers. These provisions are different from non-compete provisions and don't ordinarily prohibit employees from working for a competitor—or as a competitor—as long the employees don't solicit or accept business from the specified group of customers. This may give employers the ability to continue to protect their

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legitimate business interests, confidential information and customer relationships.

Provisions included within, or executed contemporaneously with, agreements between sellers and buyers of businesses where sellers agree not to compete with the buyers' businesses are also specifically carved out of the ban under the Act.

Exempt Workers

The non-compete ban will apply to all employees who work in the District of Columbia and prospective employees who are expected to work in the District. Exempt from the law are unpaid volunteers, lay members of a religious organization who are elected or appointed to office within the organization, babysitters, and certain medical specialists.

According to the new law, medical specialists work for employers engaged primarily in the delivery of medical services, hold a license to practice medicine, have completed a medical residency and earn at least $250,000 per year. A medical specialist's prospective employer must give the proposed non-compete provision to the medical specialist at least 14 days before the execution of the hiring agreement.

Notice Requirements

The law also requires that employers provide a specifically worded written notice to employees within 90 days after the law goes into effect. New employees must receive the written statement within seven days after becoming an employee of the employer. If an employee asks for a copy of the statement, the employer must provide it within 14 days.

The notice required by the law says:

"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."

Penalties Assessed

Violators of the new law may be assessed an administrative penalty between $350 and $1,000 for each violation, with fines of at least $3,000 imposed for subsequent violations for each employee affected. Employees or prospective employees alleging violations of the new law may file an administrative complaint with the District of Columbia's mayor or a civil action in court.

Potential Opposition and Delay in Enactment

The District of Columbia City Council unanimously passed the measure, over Mayor Bowser's expressed opposition. The act was transmitted to Congress on Feb. 1 for the mandatory 30-day congressional review process that applies to all District of Columbia acts under the District of Columbia Home Rule Charter. According to the D.C. City Council's legislative tracker, the projected date the law goes into effect is March 15, absent a congressional resolution affirmatively disapproving the Act.

The congressional review process could flag the cost of implementing the law. A statement on the fiscal impact of the law, prepared for the D.C. City Council in November, states that there are insufficient funds in the District's budget through fiscal year 2024 to implement the law. The law is projected to cost approximately $207,000 in fiscal year 2021 and $730,000 over the next four years, according to the statement.

While the Act could take effect after the review period, from a practical perspective, the D.C. Council must also fund the Act through its budgetary appropriations process in order for it to become effective. Acts accompanied by fiscal impact statements showing unbudgeted costs, as this one was, "shall be subject to appropriations prior to becoming effective," under the District of Columbia Omnibus Authorization Act. The D.C. Council could pass special funding for the act or take up the funding when it considers the budget for the next fiscal year, which starts Oct. 1. It is possible that the Council won't fund the law at all, although that seems unlikely given its unanimous passage.

What Should Employers Do Now?

While full impact of the Act will not be known until regulations are enacted and the courts interpret it in litigation, employers with any operations in the District should take the following actions:

- Consult with counsel as to the status of the Act and its effective date.
- Once it is effective, provide written notice to all D.C.-based employees within 90 days of the Act as noted above.
- Perform a review of existing employment agreements, policies (including deferred compensation and equity agreements) and other materials (offer letters, onboarding materials and materials given to applicants) to harmonize and/or reconcile with the new requirements of the Act.
- Consider implementing other types of restrictive covenants for specific employees to secure protection of trade secrets and other confidential or proprietary information.
- Consider how to reconcile and treat non-compete agreements in D.C. that were entered into before the effective date of the Act.
- For nationwide employers, consider a holistic approach to restrictive covenant strategies, given the Act and its counterparts elsewhere in the U.S.

Related Professionals

Ian Carleton Schaefer. . . . . ischaefer@loeb.com
Mark Goldberg. . . . . mgoldberg@loeb.com

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