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Employee Benefit Plan Review

District of Columbia Council Waters Down Non-Compete Ban While Keeping Some Significant Limitations

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The District of Columbia Council has amended the Ban on Non-Compete Agreements Amendment Act of 2020 (the "Amendment"),[1] walking back from an earlier version of the bill that contemplated a nearly total ban for employee non-competes. The Amendment, however, places significant limits on employee non-competes, including only permitting non-competes for certain highly compensated employees (currently earning $150,000 or more annually), limiting non-competes to a one-year, post-employment duration, mandating certain procedures and notices when entering non-competes, and adding anti-retaliation protections. Violations of the Amendment can result in monetary fines as well as administrative enforcement and private rights of action. Signed by Mayor Muriel Bowser, the Amendment went into effect on October 1, 2022.

Background

The Amendment arrived after Mayor Bowser signed a near-total ban on non-competes in January 2021. That bill was set to prohibit non-competes for nearly all individuals performing work in the District, but implementation of that law was delayed indefinitely until there was funding budgeted for its enforcement. During the delays, the D.C. Council amended the bill several times, addressing various concerns raised by the business community and other groups, until the D.C. Council approved the more scaled-back Amendment.

Covered Employers and Employees

The Amendment continues to cover nearly all businesses "operating in the District." It applies to all individuals performing work for pay in the District on behalf of an employer and individuals offered employment whom the employer "reasonably anticipates will perform" work in the District. The Amendment does not apply to partners in a partnership.

In a welcome clarification to a previous version of the bill, the Amendment explains that it only applies to employees based outside the District if the employee spends more than 50% of his or her work time in the District, or, for new hires, if the employer "reasonably anticipates" the employee will spend more than 50% of his or her working time in the District. The Amendment applies to employees and prospective employees based in the District if they regularly spend (or are reasonably anticipated

to regularly spend) a "substantial amount" of their working time in the District and not more than 50% of their working time for that employer outside of District.

Covered Agreements

The Amendment covers written agreements and workplace policies, rules, or restrictions (whether written or implemented "as a matter of practice") that prohibit employees from working for another business for pay or from operating or starting their own business.

The Amendment expressly does not apply to:

- Non-competes executed as part of the sale of a business; and
- Provisions prohibiting disclosing, using, selling, or accessing an employer's confidential information.

The Amendment has also softened the previously proposed ban on anti-moonlighting provisions. Instead, agreements or policies restricting employees from accepting "money or a thing of value for performing work" for another business during their employment are permitted if the employer "reasonably believes" that such work would:

- Result in the employee disclosing the employer's confidential information;
- Conflict with established conflict of interest rules established by the employer, industry, or profession;
- Constitute a conflict of commitment if the employee is employed by a higher education institution; or
- Impair the employer's ability to comply with a contract, grant agreement, or federal or D.C. law or regulation.

The Amendment also appears to carve out non-compete provisions in agreements providing "a long-term incentive," including a bonus, equity compensation, stock options, stock shares or units, performance stock units, phantom stock, stock appreciation rights, or any other performance-driven incentives earned over more than one year. Notably, the Amendment is silent as to whether the limitations applying to non-competes also cover provisions prohibiting solicitation of customers or employees.

Non-Competes Only Allowed for Highly Compensated Employees

The Amendment bans non-competes with all employees except for "highly compensated employees." The Amendment defines a "highly compensated employee" as either: (1) an employee who is reasonably expected to earn greater than or equal to the minimum qualifying annual compensation in a consecutive 12-month period, or (2) an employee whose compensation earned from the employer in the consecutive 12-month period preceding the date the non-compete term begins is greater than or equal to the minimum qualifying annual compensation. The "minimum qualifying annual compensation" means $150,000 for nearly all employees. That amount is raised to $250,000 for medical specialists, which are physicians holding a license to practice medicine and have completed a medical residency. Starting in 2024 and annually thereafter, the minimum qualifying annual compensation will be increased in proportion to the annual average increase (if any) in the Consumer Price Index for All Urban Consumers for the Washington metro area.

In calculating the minimum qualifying annual compensation, employers can count base pay, bonuses and cash incentives, commissions, overtime premiums, vested stock (including restricted stock units ("RSUs"), and any other "payments provided on a regular or irregular basis." Fringe benefits that are not paid in cash or cash equivalents cannot be counted as compensation for purposes of the Amendment.

Limits on Non-Compete Duration And Scope

For non-competes to be enforceable, the Amendment requires the non-compete to include functional, geographical, and temporal terms. The Amendment limits the post-employment duration of non-competes to one year for all highly compensated employees, except for medical specialists, which is limited to two years post-employment. The functional scope of the non-compete must include "what services, roles, industry, or competing entities the employee is restricted from performing work in or on behalf of."

Procedural Requirements

The Amendment requires employers to provide the non-compete to employees in writing at least 14 days before either the start of an employee's employment, or, if already employed, the date of execution. The employer must also provide the following notice to employees when asking them to enter a covered non-compete:

> 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).

If an employer has a workplace policy that includes an exception to the non-compete provision (e.g., related to the sale of a business or prohibiting the disclosure of confidential information), then the employer must provide an employee with a written copy of that policy within 30 days of the employee's acceptance of employment with the employer, within 30 days of October 1, 2022, and any time when such a policy changes.

Retaliation Prohibited

The Amendment also prohibits employers from retaliating against:

- A non-highly compensated employee for refusing to agree to or comply with a non-compete or for asking or complaining about the existence of a non-compete; or
- A highly compensated employee for asking about or objecting to a non-compete that the employee believes is unenforceable.

Employers are also prohibited from retaliating against employees (whether highly compensated or not) for asking the employer to provide information about the function, geographic scope, or duration of a proposed non-compete or the procedural requirements related to the non-compete.

Consequences of Non-Compliance

The mayor and attorney general for the District are responsible for administering and enforcing the restrictions in the Amendment. The Amendment allows aggrieved individuals to pursue violations by filing either an administrative complaint with the mayor or a civil action in a court of competent jurisdiction. Violations of the restrictions in the Amendment can result in administrative penalties of no less than $350 per violation (or no less than $1,000 per violation in the event of retaliation) and monetary relief varying from $250 (for failing to disclose a non-compete policy) to "not less than $3,000" (for subsequent violations).

Effective Date

The Amendment took effect on October 1, 2022 but does not impact any non-compete agreements that are signed before the October 1, 2022 effective date.

Looking Ahead

Employers operating in the District should review their non-compete and anti-moonlighting agreements and policies in light of the new limitations in the Amendment.

The Amendment continues a trend of jurisdictions, including Colorado and Illinois, cracking down on employers' use of non-compete provisions. Employers should continue to monitor developments in this area as a number of states have proposed laws seeking to limit employee non-competes and the Federal Trade Commission has stated an intent to take some action on employee non-competes in the near future.

Note

1. *https://lims.dccouncil.gov/downloads/LIMS/47234/Meeting1/Engrossment/B24-0256-Engrossment3.pdf.*

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