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New Year, New Rules: The District of Columbia's New Ban on Non-Compete Agreements

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On January 11, 2021, D.C. Mayor Muriel Bowser signed the Ban on Non-Compete Agreements Amendment Act of 2020 (the "Act"), which, once effective, will be one of the broadest bans on non-compete agreements in the country. Notably, the Act not only forbids agreements and policies that prohibit an employee from being employed by another person, performing work or providing services for pay for another person, or operating the employee's own business after the employee's separation from employment, it also bans agreements and policies that prohibit the aforementioned activities *during* the employee's employment—thereby rendering anti-moonlighting policies impermissible in the District. Further, unlike state laws that only prohibit non-competes for lower income workers, the Act applies to D.C. employees regardless of their salary.

Here are the key points employers should know:

Does the Act apply to all employees and employers within the District?

Yes, with limited exceptions. For example, non-competes are still permissible for certain volunteers; babysitters; lay members elected or appointed to office within a religious organization and engaged in religious functions; and "medical specialists," defined as licensed physicians who have completed a medical residency, make at least $250,000 a year, and work for an employer engaged primarily in the delivery of medical services. Although non-competes are permitted for medical specialists, there are special rules governing the provision of such non-competes: the non-compete must be provided to the medical specialist at least 14 days before its execution and must be accompanied by a written notice informing the medical specialist of the Act.

The term "employee" is broadly defined as an individual who performs work in the District on behalf of an employer (which itself is broadly defined, but excludes the District or federal government) or a prospective employee who an employer reasonably anticipates will perform work on behalf of the employer in the District.

What about confidentiality agreements, non-competes entered into in connection with the sale of a business, and non-solicitation provisions?

The Act explicitly states that employers can restrict employees from disclosing confidential, propriety

or sensitive information, client or customer lists, and trade secrets. It also expressly permits non-competes for sellers that are contained within, or executed contemporaneously with, an agreement between a seller and a buyer. Further, the Act does not explicitly refer to non-solicitation provisions, so they appear to be excluded from coverage under the Act and are therefore likely still permissible.

What else does the law prohibit?

The Act prohibits retaliation against employees for asserting their rights under the Act, including, for example, retaliation against employees for: (1) refusing to agree to a non-compete; (2) refusing to abide by an unlawful non-compete; (3) asking or complaining about the existence, applicability, or validity of a non-compete provision or policy the employee reasonably believes to be prohibited under the Act to an employer, co-worker, lawyer or agent, or governmental agency; and (4) requesting the written notice provision required by the Act.

Further, the Act not only prohibits employers from requiring employees to sign a non-compete agreement, but it also prohibits employers from *requesting* employees do so. Accordingly, an employer cannot even request that an employee voluntarily enter into a non-compete agreement in exchange for something of value to the employee (e.g., a higher salary or better benefits).

Do employers need to notify employees about the Act?

Yes. Employers must notify employees of the Act by providing them with the notice outlined in the Act, which states that "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." Notice must be provided at the following times: (1) 90 calendar days after the applicability date of the Act; (2) seven calendar days after an employee is hired; and (3) 14 calendar days after the employer receives a written request from an employee for the aforementioned statement.

What are the penalties for non-compliance?

The Act provides for a private right of action for employees to sue in court, as well as the ability for employees to file administrative complaints alleging a violation of the Act. The Act lays out several administrative penalties for violations of the Act, which range from $350 to $3,000 per violation.

When does the law go into effect?

It's not entirely clear. There is a 30-day period of Congressional review before legislation enacted by the D.C. Council can go into effect, as well as additional administrative requirements. Employers should expect, however, that the law will be effective within the coming months.

Finally, the Act does not apply to non-competes entered into before the Act's applicability date, so any existing non-competes (or ones entered into between now and then) remain enforceable.

We will continue to provide updates on the Act once the implementing regulations are issued.

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