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You Better Watch Out: The OAG Is Stepping Up Enforcement of D.C.'s Non-Compete Ban

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Just over a year into the implementation of the Washington, D.C. Ban on Non-Compete Agreements, as amended by the Non-Compete Clarification Amendment Act of 2022 (together, the "D.C. Non-Compete Ban"), the District of Columbia has begun enforcement of the law, which prohibits non-compete agreements for most D.C. employees earning less than $150,000 annually.* For further analysis of the law as amended, please see our prior blog post here.

On November 17, 2023, D.C. Attorney General Brian L. Schwalb announced that the Office of the Attorney General ("OAG") settled three investigations with D.C. employers – two involving non-compete agreement violations, and the other involving no-poach clauses in a franchising agreement. We have summarized the settlements below.

Non-Compete Agreement Violations

The OAG first investigated a Florida-based healthcare recruiting and staffing agency that subjected ten of its D.C. workers to non-compete agreements alleged to violate the D.C. Non-Compete Ban. The OAG agreed to end the investigation after the staffing agency signed a settlement agreement in which it agreed to pay over $100,000 in damages and penalties.

Under the settlement terms, the staffing agency must pay $10,000 in penalties to the District; $1,000 to each of its D.C. workers required to sign the non-compete agreement; and $104,845 in restitution to one worker for lost wages and damages resulting from 90 days of unemployment because of the company's enforcement of the illegal non-compete. The staffing agency must also stop using non-compete agreements for its D.C. employees and

provide notice to its D.C. employees that their non-compete agreements are null, void, and unenforceable. Finally, the staffing agency must submit an annual report in 2023 and 2024 to the District detailing its D.C. employees, their job titles, and total compensation, with a signed certification attesting to the company's compliance with the D.C. Non-Compete Ban.

The second OAG investigation targeted a D.C.-based ping pong social club, which had imposed non-compete restrictions on three of its D.C. employees. The social club resolved the violations by entering a settlement agreement requiring the company to pay $15,000 in penalties to the District and $1,000 to each of the three workers who signed the non-compete agreement. Like the staffing agency referenced above, the social club must also cease using and enforcing non-compete agreements against all of its D.C. employees, provide notice to all D.C. employees subject to a non-compete agreement that they are no longer bound by the provision, and submit an annual report to the OAG for 2023 and 2024 demonstrating compliance with the D.C. Non-Compete Ban.

"No-Poach" Clause Violations

The OAG's announcement covered a third investigation of an employer that operates a franchising system for sushi bars and Asian hot food bars in numerous locations across D.C. Notably, while the company has over 30 franchisees within D.C., it has no offices or employees in the District. Nevertheless, it appears that the OAG determined that the presence of franchisees meant that the company operated within the District, and found the company's "no-poach clauses," which prohibited employees from working for another franchise in the same chain, violated the D.C. Non-Compete Ban.

The settlement terms require the company to remove the offending no-poach provisions from its future contracts with franchisees, directs the company to stop enforcing any existing no-poach provisions for franchisees located within D.C., and inform its D.C. franchisees that it will not enforce the no-poach clauses and that they are permitted to hire an employee who works at another franchise within the chain.

Takeaways

These investigations show that *all* employers could be subject to investigation, even small businesses, companies headquartered outside of D.C. with few D.C. employees, and franchisors with no D.C. employees. Therefore, compliance remains critical for any company operating within D.C. regardless of the number of employees located in the District.

As employers gear up for 2024, they should review their non-compete practices to ensure compliance with the D.C. Non-Compete Ban, provide appropriate notices required by the law to new and existing employees, and track the compensation thresholds that permit exemptions to the D.C. Non-Compete Ban. Additionally, any employer modifying its remote work policies for the new year should review the D.C. Non-Compete Ban's applicability to its workforce, especially as to employees working remotely from D.C.

**Beginning January 1, 2024, the minimum qualifying compensation to which employees may be subject to a non-compete will increase in accordance with the annual average wage increases published by the United States Department of Labor. Employers should review the "Consumer Price Index for All Urban Consumers in the Washington Metropolitan Statistical Area" annual average increase for 2024 and each calendar year following to determine if an employee may be made subject to a non-compete.*

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