

June 2021

Follow @Paul_Hastings



D.C. Considering Conflict of Interest Exception to Sweeping Ban on Non-Compete Agreements

By [Carson Sullivan](#), [Ken Willner](#), [John McDermott](#) & Claire Saba

The D.C. Council is considering adding a conflict of interest exception to the recent law banning non-compete agreements between employers and employees in the District. On January 11, 2021, Mayor Muriel Bower signed into law [one of the nation's broadest bans on prospective employee non-compete agreements](#). The original sponsor of the bill, Councilwoman Silverman, recently proposed an amendment to that law¹ (the "Amendment"), which would clarify that employers may validly enforce policies prohibiting employees from accepting employment with other employers where such employment would result in a conflict of interest. The Amendment would also prohibit employers from retaliating against employees that inquire whether their conduct violates the employer's conflict of interest policy.

The Amendment

The proposed changes would amend the law to enable employers to use "a bona fide conflict of interest provision."

The Amendment defines a bona fide conflict of interest provision as:

an otherwise lawful written provision or workplace policy that bars an employee from accepting money or a thing of value from a person during the employee's employment with the employer because the employer reasonably believes the employee's acceptance of money or a thing of value from the person will cause the employer to (A) [c]onduct its business in an unethical manner; or (B) violate applicable local, state, or federal laws or rules.

Section 101(5) of the law would be amended to list "a bona fide conflict of interest provision" among the items that are not encompassed by the term "non-compete provision."²

Section 102(c), dealing with prohibited workplace policies, would be similarly amended. Section 102(c) currently states: "No employer may have a workplace policy that prohibits an employee from: (1) being employed by another person; (2) performing work or providing services for pay for another person; or (3) operating the employee's own business." The Amendment would change this provision to read, at the beginning of the sentence: "*With the exception of a bona fide conflict of interest provision*, no employer may have a workplace policy . . ." (emphasis added).

Finally, the Amendment also adds a provision prohibiting employers from retaliating against employees for "asking the employer whether the employee's acceptance of money or a thing of value from another

person during or after the employee's employment for the employer violates the employer's workplace policy."

Timing

The Amendment was referred to the Committee on Labor and Workforce Development on June 1, 2021. The Amendment still has to clear that committee, undergo a vote of the D.C. Council as a whole, and survive an opportunity for the Mayor to sign or veto the bill. Finally, Congress has 30 days to review the Amendment. If Congress does not act in those 30 days the Amendment will become law. The Amendment adopted the same fiscal impact statement as the D.C. Non-Compete Law; therefore the Amendment will be implemented if the D.C. Non-Compete Law is funded (it is not currently funded, so the original law is not "applicable" yet). It is unclear if the Amendment will pass before the D.C. Budget is approved by Congress.

Conclusion

Employers with employees in the District should be watching the Amendment closely. The current state of the law creates an unnecessary amount of ambiguity as to whether employers can enforce policies prohibiting conflicts of interest that arise in the context of moonlighting employees. The Amendment seeks to inject some clarity into the law and give employers a common-sense tool to prohibit employees from taking on conflicts of interest when moonlighting. If the Amendment does not pass, it will likely be up to the courts to determine whether conflict of interest policies can overcome the law's ban on non-competes, leaving employers with little certainty in the interim.

Paul Hastings is monitoring all developments, including issuance of further guidance or rules on the original Act, and will provide updates when they are available.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Washington, D.C. lawyers:

Carson H. Sullivan
1.202.551.1809
carsonsullivan@paulhastings.com

John McDermott
1.202.551.1896
johnmcdermott@paulhastings.com

Kenneth M. Willner
1.202.551.1727
kenwillner@paulhastings.com

Claire Saba
1.202.551.1827
clairesaba@paulhastings.com

¹ The amendment is entitled: Non-Compete Conflict of Interest Clarification Amendment Act of 2021.

² The text of Paragraph (5) would thus read: "Non-compete provision" means a provision of 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 term "non-compete provision" does not include: . . . (C) A bona fide conflict of interest provision.

Paul Hastings LLP

Stay Current is published solely for the interests of friends and clients of Paul Hastings LLP and should in no way be relied upon or construed as legal advice. The views expressed in this publication reflect those of the authors and not necessarily the views of Paul Hastings. For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought. These materials may be considered ATTORNEY ADVERTISING in some jurisdictions. Paul Hastings is a limited liability partnership. Copyright © 2021 Paul Hastings LLP.