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D.C. Reverses Course: Final Amendment Allows Non-Compete Agreements for Highly Compensated Employees

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On July 27, 2022, the D.C. Council enacted the long-awaited Non-Compete Clarification Amendment Act of 2022 ("the Amendment"), which amends the previously passed Ban on Non-Compete Agreements Amendment Act of 2020 (the "Act") (together, "the Law"). The Amendment drastically transforms what would have been one of the nation's broadest bans on employee non-compete agreements[1] into a wage threshold non-compete ban with helpful carve-outs for employers to prevent the theft of trade secrets and moonlighting.

As amended, the Law now permits employers to enter into non-compete agreements with covered D.C. employees earning $150,000 or more in annual compensation, and medical specialists earning $250,000 or more in annual compensation. Employers are also permitted to include non-compete provisions in agreements providing long-term incentives. Unlike before, the Law now permits carefully tailored anti-moonlighting provisions as well. The outright ban on anti-moonlighting provisions contained in the original Act had been extremely concerning to D.C. employers.

Below is a detailed description of the Law, which will go into effect October 1, 2022 and is not retroactive.[2] Given that October is right around the corner, employers with current or prospective workers in D.C. should review their existing workplace policies and any non-competition agreement templates to ensure compliance with these updated requirements. Employers should also prepare themselves to satisfy the Law's notice provisions, which must be fulfilled by October 31, 2022.

Final Scope and Reach of D.C.'s Not-So-Total Non-Compete Ban

Effective October 1, 2022, D.C. will ban the use of non-compete provisions for covered employees who work in D.C. The Law as now amended *expressly* carves out certain types of agreements and workplace policies from the ban. The Law also *excludes* "highly compensated" employees, along with a small category of other workers, from the ban. Finally, the Law provides helpful clarity on its reach, including what it means to "work in D.C."

Non-Compete Provisions, Defined

As a general rule, employers will soon be prohibited under the Law from implementing a "non-compete provision" with an employee[3] who works in D.C. The Law defines "non-compete provision" as "a provision in a written agreement *or a workplace policy* that prohibits an employee from performing work for

another for pay or from operating the employee's own business." (emphasis added). It is important to note that the Law defines a "workplace policy" as "the rules and restrictions, *whether written or as a matter of practice*, implemented by an employer to govern the conduct of the employer's employees." (emphasis added).

Employers should note, however, that the Law's definition of a non-compete provision *expressly excludes*—and therefore permits the use of—an otherwise lawful provision related to:

- the sale of a business;
- nondisclosure or confidentiality agreements that prohibit or restrict employees from "[d]isclosing, using, selling, or accessing the employer's confidential employer information or proprietary employer information;"
- anti-moonlighting provisions, where the employer reasonably believes that the work will:
  - "Result in the employee's disclosure or use of confidential employer information or proprietary employer information;
  - Conflict with the employer's, industry's, or profession's established rules regarding conflicts of interest;
  - Constitute a conflict of commitment if the employee is employed by a higher education institution; or
  - Impair the employer's ability to comply with District or federal laws or regulations; a contract; or a grant agreement; or"
- "provid[ing] a long-term incentive," which is defined as "bonuses, equity compensation, stock options, restricted and unrestricted stock shares or units, performance stock shares or units, phantom stock shares, stock appreciation rights, and other performance driven incentives for individual or corporate achievements typically earned over more than one year."[4]

As stated above, contrary to prior iterations of the Act, the Law will in fact permit employers to include anti-moonlighting provisions in their employment policies and agreements where circumstances warrant. Employers may also have the flexibility to leverage long-term incentives in exchange for a non-compete agreement.[5]

The Amendment did not resolve the Act's ambiguity with respect to the permissibility of non-solicitation agreements. The Law's enumerated list of permissible workplace provisions does not include non-solicitation agreements. However, the Law does not expressly prohibit non-solicitation agreements.

Highly Compensated Employees Exempted

D.C.'s ban on employee non-compete provisions has one critically important carve-out. The Law, as now amended, excludes highly compensated employees from its ban on non-competes. In other words, employers may continue to implement otherwise lawful non-compete provisions for employees who earn "greater than or equal to" the defined wage threshold.

Under the Law, a "highly compensated employee" is an employee, other than a broadcast employee,[6] who is "reasonably expected" to earn compensation greater than or equal to the minimum qualifying

annual compensation for a 12-month period.[7] The Law currently sets the minimum qualifying annual compensation at $150,000, in general, or $250,000 for medical specialists.[8] Starting in 2024, this minimum qualifying annual compensation will increase annually based on the Consumer Price Index.

Notably, the Law defines "compensation" to mean "all monetary remuneration an employer may pay or promise to an employee" and expressly includes hourly wages, salary, bonuses or cash incentives, commission, overtime premiums, vested stock (including restricted stock units) and other payments provided on a regular or irregular basis. Compensation does not include "fringe benefits other than those paid to the employee in cash or cash equivalents."

When drafting new agreements, D.C. employers should note that the Law requires that a non-compete agreement with a highly compensated employee specify:

- "[t]he functional scope of the competitive restriction, including [the] services, roles, industry, or competing entities the employee is restricted from performing work in or on behalf of;"
- the geographical limits; and
- the term.

With respect to the term, medical specialist non-compete agreements cannot exceed 730 calendar days following the specialist's separation of employment. All other highly compensated employee non-compete agreements cannot exceed 365 calendar days post-separation of employment. The Law does not provide further instruction on functional scope or geographic limits.

Other Exempted Employees

In addition to highly-compensated employees, the Law also allows non-compete provisions for additional categories of workers, such as casual babysitters[9], "partner[s] in a partnership," and government employees.

What it means to "Work in D.C."

To be covered by the non-compete ban, an employee must either (a) spend at least half of his or her work time in D.C.; or (b) be based in D.C., spend a substantial amount of his or her work time in D.C., and spend not more than 50% of his or her work time for that employer in another jurisdiction. If the employee has not yet started working for the employer, that employee is covered if the employer reasonably anticipates that the Law will cover the employee once the employee starts working.

Notice & Recordkeeping Requirements

Though the details are yet to be promulgated, employers should note that the Law will impose several notice and recordkeeping requirements.

First, any employer with a permissible non-competition policy (including, e.g., an anti-moonlighting policy) must provide a "written copy" of the policy to employees by October 31, 2022, and then any time the policy changes. Employers must also provide a written copy of the policy to a new hire within 30 days after the employee's acceptance of employment.

In addition, employers with a non-compete provision for a highly compensated employee must also: (1) provide the highly compensated employee with the non-compete provision in writing at least 14

days before the employee starts employment or is required to execute the agreement; and (2) "provide the following notice to the employee whenever a non-compete provision is proposed to the employee:"[10]

> The District's 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, as that term is defined in the Ban on Non-Compete Agreements Amendment Act of 2020, 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).

Last, the Law anticipates the promulgation of regulations that include a record requirement for employers. However, no further details regarding recordkeeping have been provided at this time.

Also Prohibited: Retaliation

Employers must also comply with robust anti-retaliation provisions. The Law prohibits retaliation against current or prospective employees[11] who:

- refuse to sign a *prohibited* non-compete (e.g., a non-compete for an employee who is not highly compensated);
- fail to comply with a prohibited non-compete or unlawful workplace policy;
- ask, inform, or complain about a non-compete the employee reasonably believes is prohibited; or
- request a copy of the non-compete or information required in the non-compete for highly compensated employees.

Consequences of Violating the Law

Any non-compete that violates the Law is "void as a matter of law and unenforceable." The Law also includes various penalties for violations of the Law ranging from $250 to "not less than $1,500" and increased penalties for subsequent violations of "not less than $3,000" for each affected employee.

Under the Law, an aggrieved person may file an administrative complaint or file a civil action directly in a court of competent jurisdiction.

Next Steps for Employers

- Employers should review all template employee agreements to ensure impermissible non-compete clauses and/or agreements are removed by October 1, 2022.
- Employers should review workplace policies and practices to ensure compliance with the Law by October 1, 2022.
- Employers should be prepared to comply with each of the Law's specific notice requirements, including 1) providing a written copy of the workplace policies described above to all D.C. employees by October 31, 2022 and 2) providing a written copy of the non-compete agreement to highly-compensated employees 14 days before the employee starts employment or is required to execute the agreement and including the specific language in that notice, as also described above, starting October 1, 2022.

- Non-D.C. based employers with flexible remote work policies should take stock of whether employees who are or will be working remotely in D.C. are or will be spending more than 50% of their work time in D.C. so that they can ensure compliance as to those workers even though the employer is not based in D.C.

Paul Hastings is monitoring all developments, including issuance of further guidance or regulations, and will provide updates when they are available.

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

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[1] See our previous client alert on the Ban on Non-Compete Agreements Amendment Act of 2020.

[2] Although D.C. "enacted" the Amendment via passage by the D.C. Council and signature from the Mayor, the Amendment will become final law after the Congressional Review Period. *See* District of Columbia Home Rule Act, D.C. Code §§ 1-201.01 *et seq.*, Pub.L. 93-198 (1973) (requiring any civil act approved by the Mayor and the D.C. Council to then pass a Congressional review period before becoming law; in the absence of Congressional veto, the act will become law). We do not anticipate any federal veto; however the Congressional Review Period runs through November 10, 2022. Because of this, the D.C. Council has now passed the Non-Compete Clarification Emergency Amendment Act of 2022 as a stopgap measure to ensure that the Law will go into effect on October 1, 2022 as planned.

[3] The Law defines the term "employee" as "[a]n individual who performs work in the District on behalf of an employer . . . or . . . [a]n individual whom has made an offer of employment and whom an employer reasonably anticipates will perform work on behalf of the employer in the District." Though independent contractors are not expressly addressed in the Act, courts have interpreted other D.C. laws with similar language (including the D.C. Human Rights Act), as excluding independent contractors.

[4] The Law also states specifically that it shall not supersede the terms of a valid collective bargaining agreement.

[5] In this situation, the employer would provide a long-term incentive to an employee in exchange for a non-compete requirement. If an employee violated the non-compete provision, that employee would lose the long-term incentive.

[6] The Law defines "Broadcast employee" to mean "an on- or off-air creator (such as an anchor, disc jockey, editor, producer, program host, reporter, or writer) of a legal entity that owns or operates one or more of the following: (A) A television station or network; (B) A radio station or network; (C) A cable station or network; (D) Satellite-based services similar to a broadcast station or network; or (E) Any other entity that provides broadcasting services such as news, weather, traffic, sports, or entertainment programming."

[7] The calculation for compensation in the 12-month period could be calculated two ways. The compensation could be based on the amount the employee "is reasonably expected to earn from the employer in a consecutive 12-month period . . . ; or [based on] compensation earned from the employer in the consecutive 12-month period preceding the date on which the proposed term of the non-compet[e] is to begin[.]"

[8] A medical specialist is defined as an individual engaged primarily in the delivery of medical services, who: holds a license to practice medicine; is a physician; and has completed a medical residency.

[9] The law does not explain why casual babysitters are explicitly excluded from coverage, particularly in light of the new wage threshold. This exclusion was included in the original 2020 D.C. Non-Compete Act as well.

[10] Although the Law does not specify how employers must provide the required notice, the Law does not explicitly require employers to include this notice language in the non-compete agreement.

[11] The Law's anti-retaliation provisions broadly apply to "[a]n individual who performs work for pay in the District on behalf of an employer;" or "[a]n individual to whom the employer has made an offer of employment and whom an employer reasonably anticipates will perform work for pay on behalf of the employer in the District."